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OVERSIGHT OF THE ENVIRONMENTAL PROTECTION AGENCY'S ENFORCEMENT PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON
TOXIC SUBSTANCES, ENVIRONMENTAL
OVERSIGHT, RESEARCH AND DEVELOPMENT

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

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NOVEMBER 15, 1989

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CONTENTS

OPENING STATEMENTS

Page

Chafee, Hon. John H., U.S. Senator from the State of Rhode Island 22

Lieberman, Hon. Joseph I., U.S. Senator from the State of Connecticut 2

Reid, Hon. Harry, U.S. Senator from the State of Nevada.. 1

Warner, Hon. John W., U.S. Senator from the Commonwealth of Virginia........ 16

WITNESSES

Bernstein, Joan Z., vice president, Chemical Waste Management, Inc................. 32
- Written statement.. 89
- Response to additional questions from Senator Lieberman 96

Erickson, Edwin B., Administrator, Region III, Environmental Protection Agency... 7
- Letter to Senator Reid.. 12

Gallagher, Thomas, consultant 41
- Written statement.. 116

Habicht, Hon. F. Henry, II, Deputy Administrator, Environmental Protection Agency... 4
- Written statement.. 53

Martin, Hon. John C., Inspector General, Environmental Protection Agency.... 23
- Written statement.. 68
- Responses to additional questions from Senator Lieberman 76

Mielke, Donald E., District Attorney, Golden, Co 43
- Written statement.. 122
- Resolutions submitted by... 140

Powers, Ann, vice president, Chesapeake Bay Foundation 30
- Written statement.. 83

Starr, Judson W., attorney, Washington, DC 37
- Written statement.. 101

OVERSIGHT OF THE ENVIRONMENTAL PROTECTION AGENCY'S ENFORCEMENT PROGRAM

WEDNESDAY, NOVEMBER 15, 1989

U.S. Senate,
Committee on Environment and Public Works,
Subcommittee on Toxic Substances, Environmental
Oversight, Research and Development,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 406, Dirksen Senate Office Building, Hon. Harry Reid (chairman of the subcommittee) presiding.

Present: Senators Reid, Lieberman, Warner, and Chafee.

OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Senator Reid. The subcommittee will come to order.

Today we will formally begin our oversight into the Environmental Protection Agency's much talked about, and much maligned, often deservedly, enforcement program. We have a good deal of ground to cover with excellent witnesses.

The Environmental Protection Agency's enforcement structure is often referred to as a Rube Goldberg toy. Thanks to the paranoia of the previous Administration, the technical support staff which at one time worked closely with the agency's enforcement attorneys no longer work with them directly. They are physically separated and they are separated by notorious internecine turf battles between EPA offices. Indeed, EPA's fear of a litigious, lawyer-led EPA resulted in charges of sweetheart deals with polluters and the downfall of an entire EPA Administration. Subsequently, EPA has issued reams of statistics and press releases to prove that it is, indeed, enforcing America's environmental statutes.

You might think it obvious that regional enforcement attorneys should report both to their Regional Administrators and to the Headquarters Assistant Administrator for Enforcement and Compliance Monitoring. In fact, if you thought that you would be wrong. Regional enforcement attorneys sit in the Office of Regional Counsel. The Regional Counsel reports to the Regional Administrator and to the Headquarters General Counsel, of all people. Just thinking about all of this reminds me of the "Ol' Perfesser," Casey Stengel, who once asked, "Can't anybody here play this game?" If the game was making the polluter pay, Mr. Stengel would have answered, as if talking to himself, "No way." But there is more.

EPA has set up a Strategic Planning and Management System or SPMS. If you refer a case, you get a credit. Derisively, most refer to those credits as "beans." It doesn't matter whether you refer to the Department of Justice an easily prepared, low resource intensive case, involving relatively little adverse impact on the environment or a complicated, high resource intensive case, involving significant environmental impact. You get the same bean.

And how does EPA spell success? It would have to be, B- E-A-N. If you need a bean before the end of a quarter, just refer an incomplete case. Most assuredly, it will be returned to you. But you'll still get your number, your bean.

Every year the agency issues a press release telling us how many of these cases and types of actions it has taken. But it doesn't tell us about the environment. Is the environment better off for EPA's enforcement efforts or not? What significant cases didn't the agency get to? And, how many dollars in penalties were negotiated away without sufficient documentation as to reason? Is the signing of a consent agreement the beginning or the end of the enforcement process?

Jointly, this hearing should lead recommendations to the full committee and to EPA measures of environmental enforcement success that provide the public with knowledge of environmental improvements resulting from enforcement efforts. We are not concerned solely with bureaucratic velocity. Such velocity without environmental improvements is akin to a tree without roots, and in a very real way undermines agency credibility and public trust. We shall utilize these measures of enforcement success as we continue to oversee EPA's enforcement programs.

This hearing will also examine structural changes to be proposed by Deputy Administrator Habicht this morning. Will that restructuring resolve some of the Rube Goldberg problems we've observed and allow for greater enforcement efficiency? We all hope so.

I also expect my subcommittee to recommend priorities by which to conduct an enforcement program. Targeting enforcement efforts on a priority basis will allow for the wisest use of scarce resources in search of environmental improvements.

Finally, let me say that I take Administrator Reilly and Deputy Administrator Habicht at their word. They intend to enforce the law. It has been said that structure matters little if you have the will to enforce. I believe that the will to enforce does exist. But an efficient structure, guided on a priority basis, utilizing agreed upon measurements of success will deliver a better enforcement program, a better environment and a much more credible EPA.

Senator Lieberman.

OPENING STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Thank you, Mr. Chairman, for your leadership in holding this hearing, and for the content of your statement.

I know that this will be the first in a series of ongoing hearings, in which this committee, in its oversight role, will examine EPA's enforcement efforts. When I was Attorney General of Connecticut, environmental enforcement was one of my priorities, because without it most of the rest of environmental protection lacks meaning, lacks teeth, lacks reality.

I'm very pleased to have the opportunity to continue my interest in environmental enforcement as a member of this subcommittee. At Hank Habicht's confirmation hearing, I mentioned that the President and Administrator Reilly had sent a very important message to this committee and the public about the importance of enforcement when they nominated Hank as the Deputy Administrator. Again, it is significant that his first appearance before this committee is to present the outline of the agency's enforcement strategy. The message of his testimony, which I've looked over, is that enforcement will be one of the principal tools of the agency for achieving compliance. That makes sense, although it hasn't always been the case. If a precise regulation does not exist to cover the hazard to the environment, the agency will look to its broad enforcement authorities to achieve compliance.

In conversations that I've had with the Deputy Administrator, he's indicated that enforcement is even more important now that some of our laws are moving away from straight command and control to market based creative approaches. And I totally agree with this. In a Clean Air Act debate, which is going on right now, for example, the members of this committee have expressed concern about the enforceability of some of the new trading approaches. EPA's enforcement role, therefore, will take on a special significance if these new approaches are going to be successful.

Perhaps the most difficult issue that we're going to be discussing this morning, Mr. Chairman, is the need to establish some yardsticks for measuring success of an enforcement program. Those yardsticks are particularly important for two reasons. First, ultimately, they will provide the basis for determining whether our environmental laws are really working. For example, is the quality of water in the Chesapeake Bay, or Long Island Sound, really improving. Second, the yardsticks are important to this committee, because they will be used as we perform our role as overseers of EPA enforcement.

I know that the Deputy Administrator and other witnesses who will testify this morning, will tell us that the success of environmental enforcement cannot simply be measured by the number of cases filed or indictments issued. For example, it may not be appropriate to give the same degree of credit, if I can use that term, for one multi count indictment against a large corporation or individual executives as we give to a one count indictment against one individual. Moreover, the number of cases filed in court may not be the only factor that we should use in determining whether EPA's policies are actually achieving greater compliance with the law.

EPA is about to embark on a dialogue with Members of Congress and the public about the role of enforcement and the measurements of its success. I commend the Administrator for this, and believe it will be an extremely useful process. Ultimately, the Members of Congress will need to understand EPA's approach and its philosophy. If we all agree on some of the basic aspects of an enforcement program, the dialogue between EPA and this committee will help to send a clear message that neither the Administration nor Congress, will tolerate noncompliance with our environmental laws.

Thank you, Mr. Chairman.

Senator **Reid**. Thank you, Senator Lieberman.

The first panel of witnesses will consist of Hank Habicht, the Deputy Administrator of the United States Environmental Protection Agency, and Mr. Ted Erickson, Region III Administrator of the EPA.

Mr. Habicht, we would like you to limit your statement to the committee to seven minutes. We have a timing light here, and when the red light comes on, your time is up and we'd appreciate it if you would stop. We have questions that we'll ask you after the two of you have completed your testimony.

Mr. Habicht.

STATEMENT OF HON. F. HENRY HABICHT II, DEPUTY ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. **Habicht**. Thank you, Mr. Chairman, and Senator Lieberman. We have a written statement that, with your leave, we'll submit for the record. I will try to keep my comments brief.

This is an important hearing. We welcome this kind of a dialogue. We consider it a dialogue—a conversation at a very important time in the overall evolution of EPA as an agency, as well as other agencies and institutions in the job of environmental protection. And we see enforcement at a very important point. I'm anxious to begin this, as you indicate, as a series of hearings to talk about where we're going with enforcement, demystify enforcement for the public, and the regulated community as well.

To really lay out on the table where we intend to go . . . we intend to be aggressive; we believe that enforcement plays a critical role in making the environmental protection movement work and function—particularly, as we move into new approaches, Senator Lieberman, as you indicated, in protecting the environment. Command and control approaches will still be with us, but as market-based and other kinds of new approaches come to the fore, enforcement will be as important—if not more important—than ever before.

We also see enforcement as providing great opportunities to take a multimedia look at specific sources of pollution and environmental contamination immediately. We hope, over the long run, that the Agency will be able to look holistically across media as we look at preventing pollution as the main goal for the future. Even in the near term we can use enforcement both to promote pollution prevention and to look on a multimedia basis at sources, and to look at geographic areas of the Country, such as the Chesapeake Bay or Long Island Sound.

Our message today is that enforcement is in good shape, but it can improve, and it needs to improve. We need to move to integrate enforcement more into the workings of the Agency programs, both in the Headquarters and in Regions. And we need to integrate all the entities in our society—the States, increasingly the local governments, increasingly citizen's groups, and certainly Federal agencies like EPA and the Department of Justice—in a multifront, coordinated effort.

As you know, over the last few years, the enforcement performance has been building up significantly. In the fiscal year 1988, EPA had almost 3,100 administrative enforcement actions, 372 civil referrals to the Justice Department, and 60 criminal referrals. We obtained more than $35 million in civil penalties, and more than $575 million in commitments to perform Superfund hazardous waste cleanups. During that same period the States filed over 900 judicial environmental enforcement actions, and over 9,300 administrative actions. The States have really become major players in this area, as you can see by the numbers. We view this as a joint effort, and a great success. We need to improve, though.

In addition to integrating enforcement into the overall workings of the Agency, we are embarking on a strategic planning process for enforcement. The Agency is developing four-year strategic plans across the board. The Office of Enforcement will prepare strategic plans for enforcement, helping us to identify multi media and pollution prevention opportunities.

We're already beginning to undertake multi media and pollution prevention opportunities through enforcement. As this Subcommittee knows, we are working with Federal facilities in the performance and evaluation of multi media, facility-wide audits of Federal facilities. We intend to consolidate organizationally to make sure that we have a well-coordinated consolidated effort with regard to Federal facilities enforcement within the Agency, and look forward to talking more with the Subcommittee about that.

We also, as Senator Lieberman indicated, are looking at using enforcement authorities in dealing with the increasing amount of data about toxic releases, and are talking to companies and working with companies to promote, wherever we can, waste minimization and reduction of releases that present potentially significant risks.

Let me outline, very briefly, Mr. Chairman, the elements of what we're looking at in the near term to integrate enforcement and to create an accountability and measurement system that will at once be meaningful to the public and useful to the Agency to make sure that we're making the right choices in enforcement. Some of the key elements we're considering include, first and foremost, sending the message from the 12th Floor at EPA—through our actions and through our management systems—that quality enforcement must be on everyone's mind in the Agency. It is a priority area wherever the Agency goes in its programs.

In addition, we think it's important to strengthen the Office of Enforcement as the Headquarters' policy voice and advocate for strong, innovative enforcement. As I already mentioned, this will include this office's preparation of strategic plans. Secondly, the office will need to prepare and develop, along with our programs, better compliance-oriented data so that we have good, coordinated data about pollution problems and their sources in geographic regions of the Country, as well as a multi-media picture of sectors and sources, and what kind of pollution problems they're creating. We'll follow these plans and data by developing initiatives immediately, which would combine efforts, either on a geographic basis or a multi-media basis, to address problems in an organized way.

As the Chairman indicated, we need, in order to make this system effective, to revise our management accountability systems and our performance evaluation systems to give credit for substantive quality environmental results—not just counting cases in a "bean counting" system. We must give credit in our management systems for the quality of cases for the environmental results that our cases yield. And I think, as the Chairman also indicated, we need to be sure that the follow-up of consent decrees is an important element of enforcement. We need to be sure that these consent decrees are fully enforced and implemented.

We think, as part of this, the Office of Enforcement needs to have authority to review the performance of our regional enforcement officials, particularly, having direct review authority with regard to regional counsels, and to audit enforcement performance around the Agency. In return for this authority, though, the Office of Enforcement needs to shoulder the responsibility to promote enforcement training. They also need to make sure we develop meaningful data and measures of progress in enforcement and results. They need to support the Regions when the Regions have particularly demanding initiatives. The Office of Enforcement staff will be expected to go out to the Regions and roll up their sleeves to support significant cases.

I see my time is up. I would just mention, briefly, Mr. Chairman, that the Office of Enforcement also needs to be involved in rulemaking to be sure that our rules and policies are enforceable. In the future, we also would like to talk more with the Subcommittee about criminal enforcement. We consider criminal to be a source of pride in terms of what that program has done in recent years. We want to be sure it's as strong and well positioned as possible in the Agency. We've been conducting internal reviews. We're awaiting the results of a GAO study of criminal enforcement, and we will want to talk to you more about where we're going with that.

Finally, in conclusion, we intend to move forward in these areas in consultation with this Subcommittee and the States, and other interested parties right away. At the same time, we know that enforcement is extraordinarily complex with a lot of players—including citizens' groups, States, Department of Justice, Headquarters, Regions, and others.

In order to mobilize our resources most effectively, we think it's also important for us to undertake a management review of where we are now and where we're going with enforcement. This would be a broadly inclusive review, involving staff and Members of Congress, officials from all around the community, to talk about enforcement and get the issues out on the table, and develop a concrete plan for the next several years. We look forward to working with the Subcommittee in this and other endeavors.

Thank you.

Senator REID. Mr. Erickson.

STATEMENT OF EDWIN B. ERICKSON, ADMINISTRATOR, REGION III, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. ERICKSON. Good morning.

Thank you for the opportunity to appear before the Senate Subcommittee. While I have not prepared details comments, I'd like to reiterate Deputy Administrator Habicht's position concerning the importance of a strong enforcement presence within the Environmental Protection Agency. An aggressive, viable enforcement effort will serve as the basis to accomplish our mission of protecting human health and preserving the environment.

Within Region III, the Chesapeake Bay Program provides a unique opportunity to focus our resources in a defined geographic area that will encompass a multi media approach. There is growing recognition that contaminants in one medium do move to other media, and that we must more aggressively seek the sources of the pollutants and take enforcement actions against polluters if we're going to reach our goals of reducing risks, preventing pollution, and deterring violations.

There is also recognition that EPA must depend on our State partners to increase the effectiveness and strength of enforcement. This dependency is based on a fragile and sensitive relationship with the States. On one hand we seek their cooperation, help and action, and on the other hand we must impose sanctions against States as a penalty for less stringent enforcement actions than EPA determines to be proper in given situations. These two opposing positions provide a challenge that we must successfully meet if we wish to maintain a high compliance rate.

I believe that the steps outlined by Mr. Habicht, and the renewed commitment to assist in strong enforcement will enable EPA to meet this challenge and to more effectively accomplish our goal of an improved environment.

Thank you.

Senator REID. Thank you very much.

Mr. Habicht, as you know, during the previous Administration, the technical support staff were separated from the enforcement attorneys in the regions and at headquarters. Some later witnesses will say that EPA National Enforcement Investigators Center works well because the criminal investigators and the technical support staff compliment each other. Many EPA staff, both present and past, believe that the previous combination of lawyers and technical support staff in the civil enforcement program also worked well.

My question to you is, aside from the argument that such a restructuring would delay enforcement actions, what strong justification do you have in maintaining the status quo?

Mr. HABICHT. Well, Mr. Chairman, over the years, including my time at the Justice Department, I have thought and talked with people about the relative merits of how enforcement is organized at the Agency. And as you've indicated in your opening comments, enforcement has been subject to lots of different theories and organizational approaches.

In addition to delay, your question indicated you acknowledge that delay would be certainly a factor in reorganizing and moving the technical resources out of the program into an enforcement office. We would certainly be concerned. about this. We'd be very concerned about such delays and whether the benefits would justify that.

The substantive reason, in addition to that concern, that we would be cautious about moving toward a very significant reorganization like that, is that fundamentally the system has improved dramatically over the last few years under the *status quo*. Our goal is make sure that everybody in the Agency thinks about enforcement. We don't want anybody to feel as though, well, that's somebody else's job, that the enforcement job is over here in another organizational entity in the Agency. By having the technical people in the programs, where they understand the programs and the regulations—and they also know that the head of the program has both enforcement and regulatory responsibilities—in our view that helps ensure that everybody thinks enforcement in the Agency, and everybody knows that it's part of their job. So, we think the kind of structural links we're building between our Office of Enforcement and our programs, and our Regions, can promote the integration we need to make sure that it's coordinated and functions well, and focuses on priorities. And yet, by keeping the technical resources where they are, we make clear it's everybody's responsibility.

Senator **Reid**. Your staff, Mr. Habicht, has suggested that a trial recombination of enforcement attorneys and technical support staff will occur when you bring the Federal facilities program into the enforcement office. It strikes me that this is not a fair test, and that the Federal Facilities Enforcement operates under a different set of rules than does civil or criminal enforcement against corporate or other violators.

I'll ask that you consider a modified version of a proposal offered by Mr. Gallagher in testimony that he'll present later. On a trial basis, will you associate an environmental services division in one region with regional enforcement attorneys, and will you report back the results of this to the subcommittee? Think it would be worth trying?

Mr. **Habicht**. Well, that's a suggestion worth considering, and we would certainly like to talk to staff and you further about your thoughts on that, and how we might try in a number of areas to experiment with this idea. I'm not at all opposed to experimenting with a number of different areas, as long as it keeps enforcement moving forward and keeps the momentum up. So, we'd be happy to consider that and get back to you and talk to you more about it.

Senator **Reid**. One of the things that I talked about in my opening statement, and that you mentioned, is this so-called "bean" factor, where you talk about the number of cases. Having been a lawyer and working in the courts for a number of years, it was easy to see that the number of cases really was not a measure of how hard a judge worked. For example, you may have a judge who handled three jury trials the whole year, and another who handled 45. But one had a number of cases that lasted weeks, and the other had two or three-day jury trials.

How do you propose to measure quality and worth in this neverending problem to try to set quotas and make a determination as to what work is really being done?

Mr. Habicht. Well, I appreciate your recognition that numbers alone aren't the answer. I think there has been an undue preoccupation with numbers. As managers we're looking, across the board, at how we measure performance in the agency. And you need to have numbers; you need to have an objective benchmark of that sort. But it can't be the sole measure of performance. We are in the process of developing indicators that will help to demonstrate the kind of environmental improvement we get from various actions that we take.

For example, if we take an action that deals with a significant source of pollutant loadings, and we reach a resolution that stops those emissions, or those discharges, there should be communication of that result, and not just the fact that a case was brought. And secondly, in addition to that, I think the results are most important, but the amount of effort that goes into achieving those results should be accounted for. As you indicate, cases are often very different in terms of what their demands are and what their results are.

Senator Reid. Senator Lieberman?

Senator Lieberman. Thank you, Mr. Chairman.

I want to pick up from your last question about standards of evaluating progress. You talked at some length about approaches to measuring success in a civil context in your statement.

Let me just ask, I know that time cut you off as you were getting toward criminal enforcement in your opening statement, let me ask a general question. How important do you think criminal enforcement is, and then assuming you do think it's important, what standards do we apply in criminal enforcement? Is it the number of indictments, the length of the sentences? Is there a way for us to judge the impact of criminal enforcement on self-policing by polluters themselves? There's a host of questions for you to respond to.

Mr. Habicht. There are a number of questions, and they're all interrelated. They all reflect where we are with the criminal program. I think in the beginning of the criminal program our effort was to make sure we had quality cases that were investigated and prosecuted well, so we would prove to doubters out there, whether they're in the judiciary or elsewhere, that the kinds of cases being prosecuted were crimes in every sense of the word. We've accomplished that, the numbers have grown, and we're at a time when we need to find new ways to measure progress.

I think criminal enforcement is different from civil, to affirm the premise of your question. I also think, and Bill Reilly thinks, that criminal enforcement is critically important. We can see the impact that it has when we talk to people in corporations it does affect behavior. It gets people's attention. One of the most important results, in addition to basic deterrence, is to encourage companies and executives to put systems in place to show them that ignorance is not bliss, to put systems in place in their companies so that they know what's going on, and they know they can't look the other way and "think everything will be all right." And there are a lot of other incentives in what we're doing to encourage executives to make the investments to do the auditing and self-policing. So we're hopeful that's going to be a result.

At the same time, because of the nature of the criminal program, you can't target as much as you can in the civil side, in terms of going after certain kinds of pollution problems. You need to develop leads and follow them with targetting a part of that, but when we find a criminal case if the conduct is seriously culpable, willful misconduct—even if it's a small amount of pollution—that to us is an important case. So, you can't measure it by environmental results alone. I think environmental results are important. Numbers are significant, because we want the community out there to know that a number of cases are being brought in a number of different areas, and so everybody that has a company that could be potentially polluting takes notice of what's going on. I think the kinds of sentences and fines that we get are important, because that sends a signal as well.

So, it's a combination of factors. I haven't given you a specific answer because I think we're in the process of working this through, but we think it's very important, and what we would like to do would be to find a way to deal with the corporate counsel community to see if there are ways for us to gauge what's happening in terms of self-policing and self-auditing in companies. We have a good sense we're having an impact on them, and we'd like to be able to try to measure that.

Senator **LIEBERMAN**. I appreciate that answer. Let me go back to something you said at the beginning of the answer, which has suggested a problem we used to face when I was Attorney General of Connecticut, which was to convince judges that they ought to consider either serious civil penalties, or criminal penalties in environmental cases, because so often the accused, the defendants, were not the kinds of people that judges were accustomed to thinking of as criminals. And I wonder what your own evaluation is of how we're doing with that in terms of Federal prosecution? Are judges now willing to consider criminal penalties in environmental cases?

Mr. **HABICHT**. Yes, Senator, we can get you statistics, and trends in sentencing in similar kinds of cases. I think just in my experience, over the last few years, we've seen judges involved in both the civil and criminal side becoming enormously environmentally sensitive. They've become more sophisticated on what the environmental regulatory system is like, and the fines and the sentences that they've meted out have reflected that. There is still a need to educate judges. There is a National Environmental Enforcement Council, that I think you're familiar with—involving State Attorneys General, local prosecutors, Federal prosecutors, and State and local judges—where the process of continuing to educate officials about the severity of these crimes is going forward.

But, I think overall, the situation has improved to the point where judges do recognize that these are significant crimes, and are acting accordingly.

Senator **LIEBERMAN**. Let me ask you another question from my previous experiences as an Attorney General. We found that not only was it hard for the judges to think about defendants in environmental cases very often as law-breakers, because they didn't look like the law-breakers who were coming before them, but the accused themselves didn't think of themselves as law-breakers. And once they were faced with the reality of civil or criminal enforcement, I felt, though I could never document this, that the deterrent effect in these cases was even higher than it is in normal civil or criminal enforcement because people involved in companies, for instance, don't want to see their names in the paper as breaking the law.

I wonder if that experience of mine correlates with any experience you've had at the Federal level? I'm basically asking whether the deterrent effect of criminal or civil environmental enforcement is greater than in many other areas of law enforcement?

Mr. HABICHT. Based on my experience with other forms of law enforcement, I think it is. What we've seen in terms of the reactions of companies, both companies that might be under an investigation or a prosecution of companies that have seen their colleagues prosecuted, the impact is quite substantial. Now, we don't want to create unnecessary fear and hysteria among the community. We recognize the power of the criminal tool, and we take that seriously. And as a result of that, I think the criminal investigators and prosecutors have done a great job of picking cases that ought to be criminal cases.

If that trend continues, the deterrent effect will be great. And the concern on the part of these citizens, who aren't otherwise thought of as being in the criminal community, will be great.

Senator LIEBERMAN. Thank you.

Thank you, Mr. Chairman.

Senator REID. Mr. Erickson, would you give the committee an example, in your region, of a successful criminal case this past year, and also a successful civil case?

Mr. ERICKSON. There have been a couple of cases, Senator, where there has been prosecution, and actual sentencing to jail of an individual who was convicted of polluting the environment. That would be on the criminal side.

Senator REID. Tell us, for the record, what happened. What did the person do, and what was the outcome? The criminal case we're going to talk about first.

Mr. ERICKSON. It was a release of toxics into the environment, and he was actually sentenced—this was a president of a company, I believe that was his title—to a term in jail, as well as a fine.

Senator REID. Do you know what he did?

Mr. ERICKSON. I don't know specifically the chemical that was involved, no, sir.

Senator REID. You'll submit that to the committee?

Mr. ERICKSON. Yes.

[The information requested follows:]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

DEC 28 1989

Honorable Harry M. Reid
United States Senate
Washington, D.C. 20510

Dear Senator Reid:

EPA appreciates the opportunity to supplement the record of the November 15, 1989 hearing on EPA enforcement by supplying a complete response to Senator Reid's question to Region III Regional Administrator Ted Erickson seeking specific examples of recent Region III criminal and civil enforcement successes. No one case in each area is fully illustrative of our successes. We would therefore hope that few key examples are helpful to the subcommittee.

In the criminal area, our most dramatic results have included the significant prison term (three years imprisonment plus five years probation) and fine ($202,000) for John Poszgai for illegally filling 12 acres of wetlands in Bucks County, Pennsylvania and the significant corporate fine ($500,000 with $150,000 suspended for 2,000 hours of community and two years probation) against Orkin Exterminating Company for illegal pesticide applications which resulted in the deaths of two elderly people in Galax, Virginia. Region III also participated in the first environmental criminal prosecution and conviction of high-level federal civilian personnel in a case involving three employees at the Aberdeen, Maryland military installation charged with illegally storing and disposing of hazardous wastes.

Important recent civil case results range from the $70 million RCRA corrective action settlement among EPA, Allied-Signal Corporation and the State of Maryland for containment of chromium contamination at the Allied site on Baltimore Harbor to the Clean

Water Act case against Armco, Inc. resulting in civil penalties of $800,000 for violations of the NPDES permit for Armco's Butler, Pennsylvania facility. Armco is the nation's fifth largest steel producer.

EPA would be pleased to provide additional details about these or other criminal and civil enforcement successes.

Sincerely,

Edwin B. Erickson

Edwin B. Erickson
Regional Administrator

cc:
Hank Habicht, A101

Senator **Reid**. Okay.

Let's talk about a civil case that was in your region that was successfully worked through the system.

Mr. **Erickson**. Well, there have been a number of civil cases that have been worked through the system. One that is, of course, extremely current right now is in terms of the Avtex situation where there right now is a unilateral order to clean up PCBs and the latest information that I have is that——

Senator **Reid**. That's the one in Virginia?

Mr. **Erickson**. Yes, sir, it is. Front Royal, Virginia.

And the information that I have as of this morning, is that the PCBs have been removed, and that that situation is now contained.

Senator **Reid**. What did they make? I can't remember.

Mr. **Erickson**. They made rayon, sir.

Senator **Reid**. That's right.

Mr. **Erickson**. So that would be an example in that regard.

Senator **Reid**. Mr. Habicht, how can we measure the success of deterrents? A truly successful enforcement program, I would think, would deter a significant number of violations. But how can we measure deterrents in this unique field of environmental degradation?

Mr. **Habicht**. Well, I wish I had an easy answer for you, Mr. Chairman. I think what we are trying to do at the Agency as a whole is to develop better measures of trends in environmental quality, and not just measure general trends such as the amount of pollutants in a particular water course or in the air. But we must also relate those levels of pollution to suspected sources. One way we can measure the overall effect of both the regulatory and enforcement programs is to look at trends in the loading of pollutants contributed by categories of sources. We're convinced that a regulatory program can achieve a certain level of result in improving that situation, but you need to enforce to make sure that those reductions occur and stay in place.

As I discussed with Senator Lieberman, I think there may be ways for us to look at corporate behavior in terms of the kinds of internal control systems that corporations are setting up these days, the kinds of self-policing, self- auditing, reporting lines that companies have with regard to environmental compliance. And that's another measure of what the current environment in enforcement is doing in terms of behavior and activity. So you can measure sources, and you can measure environmental quality. What we're doing right now, and we'll do in consultation with all of you, is to develop precisely those kinds of indicators over the next few months, that will pull together the right measures to tell the story.

Senator **Reid**. What is the time table in which you plan to conduct the enforcement management review about which you have spoken?

Mr. **Habicht**. What we intend to do, Mr. Chairman, over the next two months, between now and say the end of January, is to conduct a series of interviews to scope the issues of the management review. What we would do is to talk to a number of people in the Legislative Branch, the Executive Branch, State and local governments, and the citizen community, to find out what they think are the most important elements of an enforcement program—and what they think EPA has done well, or should be doing better, and what the relative roles of State and local governments ought to be, so we scope out what the major issues should be. And then we will know how extensive a study we need to undertake. And as I say, by the end of January, we will have a specific game plan, which we don't intend to stretch out over a long period of time.

Senator REID. You've said that State enforcement efforts are increasing, that is the numbers are rising. But as I read the Inspector General's testimony, which he will give later today, they found that the EPA regions are not overseeing State enforcement, and that there's little follow-up of enforcement actions on a State level. How would you respond to that?

Mr. HABICHT. Well, I have talked briefly with the Inspector General about some of his concerns about enforcement and looked at his testimony, and I share some of the concerns. I share the concerns on making sure that we have systems that assure reasonable consistency in terms of penalties that we collect. Obviously, penalties can't be precisely the same across cases, because cases and facts are different. But making sure we have systems for reasonable consistency among Regions, and then ultimately, among the States, is something we need to focus on.

The relationship with the States is, as always, a delicate one in terms of making sure we have a working relationship that's effective. But we have taken the Inspector General's comments to heart, and intend to make sure that as we reinvigorate the Office of Enforcement and Compliance Monitoring, that that kind of auditing and oversight function has some teeth to it.

Senator REID. Your testimony states that the criminal enforcement program can be improved. You've talked in generalities about ways that the program can be improved. Give us some more specifics as to how you think the criminal enforcement program can be improved.

Mr. HABICHT. Certainly, Mr. Chairman, with the caveat that we are not going to make final decisions about the program until we see the results of the GAO evaluation that's going on. Some areas that we need to look at—now that the criminal program has matured, and we have a reasonable number of investigators in place who have good experience and so forth—we need to look at the structure of where the investigators are in the organization to make sure that they have the kind of Washington support that they need to have, but they maintain the degree of independence criminal investigators need to have. Structurally, that's a way that we can improve criminal enforcement. We need to be sure that the investigators are reasonably responsive to the pollution priorities of the agency, that to the extent possible they focus on priority areas of pollution, but we also recognize that the criminal process is different, that the criminal investigators need to be able to pursue leads and make judgments, as do all criminal investigators.

That kind of communication is important. We need to be sure that the cases, the investigations, move as quickly as possible. We have an obligation to make sure investigations are concluded effectively, but reasonably promptly. And we need to be sure that we're in good shape on that as well.

Senator **Reid**. Mr. Erickson, do you have any comments on any of the questions that I've asked Mr. Habicht?

Mr. **Erickson**. I can simply reinforce what Mr. Habicht has said, Mr. Chairman. In terms of the importance of the enforcement effort, it is certainly deterrent. If there is an expectation, that EPA will enforce in a very strong fashion, I believe in the long run, ultimately, that is to our benefit, and of course, to the benefit of improving the environment.

Senator **Reid**. Mr. Habicht, will you come back to us in a reasonable period of time and report the results of your management review of the enforcement program?

Mr. Habicht. I'd be delighted to, Mr. Chairman. I would make myself available to meet with the Subcommittee to talk about developments in other areas, such as the criminal program, and also the State/Federal relationship, which is something that you mentioned as an area of concern, and I think it's useful for us to talk about.

I am delighted at your interest in this. I know that you, Senator Lieberman, Senator Warner, and other members have experience in this area, and we'd be delighted to continue the dialogue.

Senator **Reid**. Again, when can we expect to be hearing from you?

Mr. **Habicht**. Well, you can certainly expect we'll keep you apprised. In fact, we would like to talk to you or your staff over the next few months and get your thoughts about what should be a part of this management review. So we'd like to schedule time to talk to you or your staff in the very near future. In January we can give you sort of a definitive game plan and prospectus for where the study is and when we expect it to be concluded.

Senator **Reid**. So, in January, we can expect to hear from you as to a time table when you can complete the study?

Mr. **Habicht**. Yes.

Senator **Reid**. Senator, Warner, do you have anything at this time?

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator **Warner**. Thank you, Mr. Chairman.

I commend you for holding this hearing. It's really a personal pleasure to serve on this subcommittee with you in the chair, and I think we're doing some very important work. I have one or two questions to direct to the witnesses. Also, Mr. Chairman, I would like to submit my opening statement for record.

[Senator Warner's statement follows:]

Opening Statement of Hon. John W. Warner, U.S. Senator From the Commonwealth of Virginia

Mr. Chairman, I want to thank you for holding this hearing today for the purpose of reviewing EPA's enforcement program. I, along with the other members of this subcommittee, believe that the vigorous enforcement of our environmental laws is vital to the full environmental protection we in Congress provide for.

I look forward to hearing the testimony of the witnesses today. In particular, I believe it will be extremely helpful for members of this subcommittee to get a better understanding of the current enforcement structure at EPA, and to hear where improvements might be made.

I am also extremely interested in the testimony that will be presented on a recent EPA Inspector General Report on the clean-up of the Chesapeake Bay. I am concerned that the federal government and the various state and local entities involved have not been working together adequately, to the detriment of the Bay clean-up. I intend to submit some questions to various witnesses today on this subject.

Thank you, Mr. Chairman.

Senator WARNER. Mr. Habicht, on the question of the Chesapeake Bay, could you enlighten us a little about an Inspector General of EPA Report to the effect that your agency should take a greater role in the cleanup, and how would this affect the present role being undertaken by other agencies of the Federal Government together with the several States that abut the Bay?

Mr. HABICHT. Well, Senator, the Chesapeake Bay is an example, as you well know and as your commitment has shown, of great ecological concern where there are still significant pollution problems. We have taken the Inspector General and other evaluations of that situation to heart. The Chesapeake Bay is an area where we would want to step up Federal activity. It would not just be in the enforcement area, I think. It would certainly include looking at enforcement and how we can compliment what the States and citizens groups are doing in that area. But also we have an obligation, I think, to develop better data about the quality of Chesapeake Bay and what the causes of the problems in the Bay are.

We've come a very long way in that regard. Regional Administrator Erickson is with me, and his Region has done a good job in looking at the data we need to develop. We need to refine and develop better data to make sure that we're all targeting the right problems in the Bay. I think we're ready to move into that.

Senator WARNER. Are you considering a greater role by EPA in this overall cleanup procedure? In other words, there could be a bit of a power struggle here. If there is, let's surface it. If some agency of the Federal Government is not pulling its full load, or the States aren't doing as much, maybe there's a vacuum into which EPA should move.

But, as you may recall, Senator Mathias and I, and certainly others, joined a decade ago to get this Bay cleanup started and it seems to be we're progressing well. I've worked with several Governors of Virginia, and the current Governor certainly has taken a leadership role on it. I'm just talking about the dynamics here. I recognize there's a very serious problem, and it's going to take a long time to achieve it, but is there any reshuffling of the responsibilities, in your judgment?

It seems to me the Inspector General made such a recommendation.

Mr. HABICHT. Well, my sense, Senator Warner, is that the Chesapeake Bay has been a good example, a very good example, of cooperation among a lot of institutions—Federal, State, and others. We don't want to undermine the good cooperative spirit and the kind of commitments that the States around the Bay are making.

Senator WARNER. Well, in other words, the bottom line, it's working. Let it continue to work as it is, is that correct?

Mr. HABICHT. I would say the bottom line is it can work better. I would say that there have been good successes and it's working well. I don't have any specific proposal for an increased EPA involvement. I think EPA needs to be sure that what we're doing supports the States as well as we can. We may not be supporting the States in terms of technical information and so forth as well as we can. But we don't want to just come in and elbow anybody out of the way. We want to facilitate and be a catalyst for cooperation.

Senator **Warner**. A question to Mr. Erickson.

You have followed, and your region has had the primary responsibility for this extraordinary problem at the Avtex plant in Front Royal, Virginia. I wrote the Chairman, and he has very graciously replied that that situation at some point in time could well become the subject of an inquiry by this committee in its oversight capacity as to the ability of the several agencies and departments of the Federal Government to work with the State in really what appears now to be a crisis situation.

I won't go into the facts, because I'm certain you're familiar with them. Again, in looking at your current statutory authority, has it been adequate with reference to Avtex?

Mr. Erickson. Senator, that's a difficult question to answer, because I think there are a number of questions within that one.

I would say, yes, at this point in time there still is a potential problem on that site. However, the immediate danger and threat has been removed and plans are, in place to remove the carbon disulfide which now poses the greatest threat.

Senator **Warner**. Well, PCB is present there, and I don't know how you determine greater threat.

Mr. **Erickson**. Yes, and much of the high level PCB contaminants have been removed from the site, to the best of our knowledge. There are vats now of concentrated sulfuric acid and sodium hydroxide. There are, of course, plans to remove those chemicals as well. So, in terms of the statutory elements, we are able to address those particular issues and deal with the immediate threat to human health.

Senator **Warner**. In other words, you think the existing statutory structure is adequate for you to deal with that particular problem?

Mr. **Erickson**. I think under TSCA, the Toxic Substances Control Act, under the Superfund Act, and the Clean Water Act, that there is——

Senator **Warner**. Adequate law on the books?

Mr. **Erickson**. Yes, sir.

Senator **Warner**. I hope that this committee will get into this thing. We may have a different view, but your view as the front line professional is important.

Now, there's a question as to—and I don't want to get into all the details, now—as to the financial viability of this company in terms of paying for the cleanup, and if not, can the former parent company be enjoined to pay for the cleanup, and if not, will the Superfund pay for the cleanup?

Mr. **Erickson**. The conclusion is that the Superfund will bear the cost if no one else can be found to bear that cost. As the Senator is aware, that is a Superfund site. There is work that has progressed, but now, of course, the situation has been exacerbated by closure of that plant, and there is some additional cleanup that will now become necessary.

Senator WARNER. It would be helpful to put on the record, now, as the cleanup proceeds, under the Superfund, what substances can be removed and cleaned up under the Superfund and what potential cleanup is not covered by this superfund.

Mr. ERICKSON. Well, at this point in time the Superfund will cover the cleanup of the carbon disulfide, of arsenic and of some chemicals that are present in the groundwater. The plan is in place to deal with that situation. There is currently, then, an ongoing investigation as to the extent of contamination of PCBs and of any other materials on that site.

Senator WARNER. Are there any other substances not covered by the Superfund, which in your professional judgment should be addressed by the State, in terms of its cleanup?

Mr. ERICKSON. As I mentioned earlier, Senator, there are some concentrated acids and bases on that site, they will be removed.

Senator WARNER. Not as a part of the Superfund program, but as a part of the State responsibility?

Mr. ERICKSON. It may ultimately come to the Superfund to kick in to remove those materials.

Senator WARNER. So, in essence you're testifying this morning that the Superfund authority probably is great enough to remove those substances which pose a harm to the environment and persons working in the immediate area, and living there.

Mr. ERICKSON. Statutorily, yes. But in terms of the financial aspect of it, that's something that will need to be determined at a future date when we have a better grasp of the cost of the project.

Senator WARNER. Well, the Superfund has adequate funds, certainly, to take care of this one project, would it not?

Mr. ERICKSON. In the absence of other projects, yes, sir.

Senator WARNER. In other words, it has to compete with other projects, but nevertheless this will be done?

Mr. ERICKSON. That's correct.

Senator WARNER. That's very helpful.

There's one last question, and I'll just sort of address it rhetorically, if either of the witnesses have a response.

This Avtex situation has been a great learning experience for me. Indeed, all of us here that are privileged to serve in this institution have to keep an open mind and be prepared to learn. And some good questions were put to me by the local citizens. They look to the Federal Government as conducting its business in such a way that there's a measure of responsibility and that responsibility should include not contracting with a company that's in open violation of the laws relating to our environment.

I can correct the record if I'm wrong, but I think that the Pentagon enters into 15,000 different contracts in a single working day. I'm not sure that we can build into those contracts a requirement that the prime contractor, and in this instance there are five subcontractors down before you hit Avtex, in that framework of contracts to build in some type of legal responsibility that Uncle Sam has to make sure that the prime contractor and all the subcontractors are in compliance with the environmental laws.

Have either of you gentlemen ever looked at that question, and would you have any views on it? I intend to explore it to determine whether or not legislation was needed in this area. Have you looked into that, Mr. Habicht?

Mr. HABICHT. Senator, we have been involved over the years, and recently in working with agencies like the Department of Defense and Department of Energy to look at these issues. We don't know whether such cooperation can solve every potential problem, and I suppose that's true of about any area of policy. But there is a potential to improve the environmental compliance elements of contracts. I get the sense that the Departments of Defense and Energy are committed to looking at their entire contracting structure and making sure that they have clauses that require that kind of responsibility.

Senator WARNER. In other words, that's a very important statement. And in your own survey you're of the opinion that the Federal Government could do a better job in its contracting to put clauses in those contracts which would require the prime contractor and such tier of subcontractors to, in some manner, work better to enforce the environmental laws of this country?

Mr. HABICHT. I would say that they can, and they are, doing a better job—and they're working on that.

Senator WARNER. Now, who is they, and who is doing what work, where? I'd like to isolate it.

Mr. HABICHT. I can't give specific names, but I know that from the top down at the Defense Department, and from the top down at the Department of Energy, the lawyers and the technical people are mobilized to look at their array of facilities and contracting relationships to make sure that they are doing the best possible job they can, and they have incentives and safeguards built into that system. Reforms are taking place, so I think it is fair to say that a better job can and will be done.

Senator WARNER. All right.

Reforms are taking place; is that just within DOD or is that other agencies and departments of the Federal Government?

Mr. HABICHT. The Federal acquisition regulations, regulations that apply to DOD as well as regulations that apply to contracting at DOE, are under review. We can certainly supply for the record an update on that.

Senator WARNER. All right. They're under review. Who's conducting that review?

Mr. HABICHT. Principally, it's being conducted by lawyers within these agencies, the experts on contracting in consultation with environmental experts.

Senator WARNER. In other words, it's an interagency group now working on this question of Government contracts and how they apply to the environment? It's just like a piece of mercury on the table. I'm chasing it around and I want to grab it. Where is it?

Mr. HABICHT. I'm trying to be as helpful as I can based on my current state of information on it. I know that it has a high level focus, that right now a lot of the action in terms of formulating options is being done within these agencies. We are pleased with the kind of consultation, by and large, that we've had from these agencies. In other words, when they get to the point of making some decisions, they ask EPA and other agencies, does this look like this will do the job. So, I think in terms of making budget commitments, and in terms of looking at their contracting relationships, they are consulting outside their agencies as well as doing a lot of work inside.

Senator **Warner**. Is your agency coordinating this interagency group?

Mr. **Habicht**. No. I would say that with regard to the contracting side, we are consulting, but the action is with the agencies that are in charge of contracting to develop their strategies.

Senator **Warner**. Well, can we, as a Government, leave it to the individual agencies to make judgments themselves on how they'll do their contracting? Shouldn't it be uniformity, government-wide?

Mr. **Habicht**. It's a question that's worth exploring. The Administration is committed to uniform basic standards of environmental protection in the way the Defense-related agencies address their operations in their contracting. I think that commitment is there, and I know it's of interest to the Congress. So, we'd be happy to continue to supply information.

Senator **Warner**. Well, what I'll do is prepare a letter to write to your boss, Mr. Reilly, and bring it to your attention to see if you can elaborate on this. I don't want to take up the time of the Chair and the other members here. But it's a subject that I intend to pursue, and I think it's important that Uncle Sam take a leadership role in the formulation of the actual drawing up of these contracts to require compliance by the prime and the subs with environmental laws, and to set up some procedure by which, if there's noncompliance that your agency which has the principal enforcement of these laws, is notified very promptly. I think if at least that bottom line is achieved, it would be helpful.

Do you have any views on this, Mr. Erickson? You're right out there in the trenches and forefront of the battle. Do you have any feeling about the Government's role in its contracting procedures to require enforcement by its subcontractors and prime contractors?

Mr. **Erickson**. I think it would be worth exploring, certainly. It could be a great help to us.

Senator **Warner**. Thank you very much. I thank the Chair, and it's a subject which I would appreciate the Chair's views at an appropriate time.

Mr. **Habicht**. Senator, if I may just add one very brief, final comment.

I think it's fair to say that not only do we share your views and concerns, but I think the entire Administration does. And also, I just wanted to mention that the ability to look on a multimedia basis, at all the different media and statutory areas of coverage in Federal facilities, is something we're pursuing with the Federal agencies. The Avtex issue is something that shows you need to look at all the different media at one time, and not just look at it on a statute-by-statute basis.

Senator **Warner**. The Avtex is a very important case study, which we must learn.

Thank you very much.

Senator **Reid**. Senator Warner, I think the questions that you asked were excellent.

My response would be, if there are adequate laws on the books, why does it take so long to do everything? And I think that's a direction that your review, Mr. Habicht, of the criminal and civil enforcement should look to, because you can have all the laws on the books that the paper will allow us to print, but if you can't, in a short period of time, bring about the result, it's not fair to the Government, and it's not fair to the person who the Government is after. And so I think that when you talk to us in January, one of the things I want you to look into is how can we expedite the process fairly. I think it's extremely important that the civil and criminal statutes that we have for enforcement of EPA laws be such that you can do this quickly.

We, in this subcommittee had another experience with alar in apples, and other fruits. The law was there, but it took forever to arrive at a result. And I think we're arriving at the same point with the laws about which Mr. Erickson spoke. And I want you to spend whatever time is necessary to look at how we can do this more quickly.

Thank you very much, gentlemen, for your time.

Mr. Habicht. Thank you, Senator.

Senator Reid. Senator Chafee had to leave. His statement will be entered in the record.

[Senator Chafee's statement follows:]

Opening Statement of Hon. John H. Chafee, U.S. Senator From the State of Rhode Island

Mr. Chairman, I want to thank you for holding this hearing today to explore an issue that in my view is one of the most important to our efforts to protect the environment—the issue whether we are doing all we can to enforce our environmental laws vigorously, efficiently, and fairly.

We were making the point just last week, during the confirmation hearing for the new Assistant Administrator for Enforcement: The Congress has enacted a vertiable cornucopia of laws over the last 20 years designed to protect the Nation from environmental degradation; yet unless those laws are enforced, our efforts will be severely compromised.

I was quite pleased to hear Mr. Strock last week when he pledged to work diligently as head of the enforcement office to ensure that enforcement is a top priority at EPA. And I am looking forward to reviewing the testimony of EPA's Deputy Administrator, Mr. Habicht, that I am sure will reconfirm the Agency's commitment.

We are also looking forward to testimony from the EPA inspector general, who has had more than a few observations relating to the ways in which the Agency's enforcement efforts can be improved.

Let me join you, Mr. Chairman, in welcoming representatives from industry and the environmental community who will provide a practical perspective of the effects of EPA enforcement, and in welcoming the witnesses who will provide insight into the criminal side of environmental enforcement. My impression has been that criminal enforcement is a growth industry, and I will be most interested in hearing from you.

Now, Mr. Chairman, I want to confess at the outset that I am troubled by several things when I try to get a handle on environmental enforcement. The first concern I have is that I am never sure how we in the Congress go about measuring enforcement "success." Is it in numbers of cases filed? In amounts of penalties collected? In measurable improvements in environmental quality? Or is it some combination of these and other measures?

My second concern is that we seem to lack the kinds of baseline data necessary to allow us to determine in any given area of the country whether our enforcement efforts are paying off. To take a nearby example, I am concerned that we do not yet have sufficient data to determine whether we are winning, or losing, the battle to preserve the Chesapeake Bay.

My third concern goes mor to an attitude than a process or a procedure. As I stated last week, enforcement must be swift and certain whenever an environmental law has been violated. Accordingly, each person involved in the enforcement effort must cultivate an agressive attitude toward ferreting out violators and ensuring that they are punished for noncompliance.

In practice, an aggressive enforcement attitude would mean that EPA systematically follows up on parties that have executed consent decrees to ensure that they are, in fact, complying with the provisions of those decrees. Such an attitude would also mean that EPA monitors closely the enforcement efforts in States that have assumed the primary enforcement responsibility under such statutes as the Clean Water Act and the Clean Air Act. I trust that our witnesses today will be able to enlighten us on how EPA is doing in these and other important enforcement areas.

Again, Mr. Chairman, you are to be commended for convening this hearing. I will have a few questions for the witnesses at the appropriate time.

Senator Reid. The next panel of witnesses will be led by the Inspector General of the United States Environmental Protection Agency, John C. Martin. Mr. Martin, I would ask that you come to the podium and introduce the people you've brought with you.

Mr. Martin. Mr. Chairman, on my right is Lee Stevens, who is an Audit Manager of ours in Chicago, who has primarily handled all our enforcement efforts. And on my left is Mr. Carl Jannetti, who is from our Philadelphia office, and who is primarily responsible for our Chesapeake Bay work.

Senator Reid. Philadelphia and Chicago, okay, great.

You have seven minutes to make your presentation.

STATEMENT OF HON. JOHN C. MARTIN, INSPECTOR GENERAL, U.S. ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY CARL JANNETTI, AUDIT MANAGER, PHILADELPHIA; AND LEE STEVENS, AUDIT MANAGER, CHICAGO

Mr. Martin. Thank you, Mr. Chairman. I'm pleased to be here this morning to have this opportunity to discuss our recent audit work relating to EPA's enforcement activities. The audits focused on the agency's activities between the fiscal years 1984 and 1988.

EPA has reported that it has increased the number of enforcement actions, and that penalty collections are running at a record level. However, are these facts in and of themselves sufficient to conclude that EPA has an effective enforcement program?

Our reviews of enforcement indicate that other factors have got to be considered. Namely, whether the penalties levied are fair and sufficient to deter violators, and whether enforcement was successful in getting necessary corrective actions taken so that the violators return to compliance and operate in accordance with pollution laws.

Over the years, EPA has developed procedures necessary to conduct an effective enforcement program. Our audits have shown, however, that the agency is not following their own procedures. Specifically, Mr. Chairman, in 1984 EPA prepared a uniform civil penalty policy. Each media program office such as RCRA, Water, and Air prepared its own civil penalty policy using the agency's uniform policy as a guideline.

The policies established a single set of goals for penalty assessment. The goals were deterrence; fair and equitable treatment of the regulated community; and swift resolution of environmental problems.

The most important mechanisms for achieving consistency are the systematic methods for calculating the economic benefit and the gravity component of the penalty that's assessed. Economic benefit is the financial benefit the violator received from delayed or avoided costs; and the gravity component reflects the actual or potential harm to the environment, importance of the regulatory violation, and the size of the violator. It is essential that penalties be calculated and each case file contain a complete description of how each penalty was developed. Then, agency managers can exercise their supervisory authority to ensure that violators are treated in a consistent and fair manner.

Inadequate calculation of penalties and insufficient documentation to support penalty reductions creates an opportunity for fraud and abuse in EPA's penalty program. All transactions and events in the enforcement process have got to be clearly documented and the documentation available and easily accessible for examination. If they're not, the agency cannot be sure that its enforcement actions contain maximum deterrence or ensure fair and equitable treatment of the regulated community.

In September of this year, my office issued a capping report which summarized previously issued audit reports on the computation, negotiation, mitigation, and assessment of penalties under three programs, Air, Water and RCRA. The report was issued to apprise senior EPA management of reoccurring problems that we identified.

The capping report showed that appropriate penalties were inadequately calculated or not calculated at all for major violations. Also, calculated penalties were reduced during negotiations. In some cases reductions were in excess of 90 percent and amounted to millions of dollars, with little or no documentation to support them. In many cases, the financial benefits the violators received from not complying with EPA regulations were not recovered through penalty assessments, making it economically advantageous for violators to be in violation of the law.

Generally, this condition existed because agency personnel did not fully comply with the penalty policies in place. To illustrate this, let me give you a few examples:

For a city that was one of the Atlanta Region's worst violators of the Clean Water Act, EPA computed an initial penalty of $3.6 million. However, citing litigation considerations of $2.9 million and ability to pay considerations of $700,000, the region computed a settlement amount of $36,844. There was no support to show the method used to arrive at the litigation consideration figure. It seemed to be an arbitrarily arrived at figure designed to reduce the amount recommended for the penalty. The case remained unresolved at the close of our audit work and the facility remained in non-compliance.

In the Boston Region, negotiators reduced the proposed penalties for a RCRA facility from $2.5 million down to $90,000 or a reduction of 96 percent. The originally proposed penalties included $2.5 million for operating a hazardous waste surface impoundment without a permit, and $64,000 for several other counts. Regional negotiators offered to reduce the penalty from $25,000 per day to $9,500 per day, based on a reassessment of potential harm. No documentary evidence existed to support the reassessment. As negotiations proceeded, the region set a target penalty amount of $200,000.

The basis for the settlement target was not clearly documented. And finally, the region agreed to a penalty of $90,000 to be paid in installments over three years.

In addition, Mr. Chairman, we found that the agency does not have complete penalty information needed to review issues and concerns associated with the negotiation and assessment of penalties. For example, EPA reports do not capture the penalties computed or assessed, nor the millions of dollars mitigated by EPA and the Department of Justice. And as a result, senior management officials are simply not in a position to fully identify areas that need improvement.

In addition, Mr. Chairman, in September, my office issued a report on the Management of the Chesapeake Bay Program Point Source Pollution Program. The Chesapeake Bay report also shows a deficiency in enforcing EPA's laws. We found that in the past the Philadelphia Region did not effectively perform its responsibilities to enforce against facilities who violated their wastewater discharge permits. As a result, polluters were allowed to discharge millions of gallons of inadequately treated wastewater into the Chesapeake Bay for many years.

For example, we identified a wood preserving operation that produced railroad ties, foundation pilings and landscape lumber. Although five enforcement orders were issued for violations of discharge permits, not one penalty was assessed in 13 years of operation. The violations that this facility produced caused a number of environmental problems, such as surface and ground water contamination, resulting in this site being declared a Superfund site. More aggressive enforcement action might have forced the industry to act more responsibly and might have reduced or even eliminated the need for a Superfund cleanup.

To summarize, Mr. Chairman, as I see my time is running out, we also examined RCRA enforcement actions. From a judgmental sample of enforcement orders in this program, we concluded that about 80 percent of the facilities sampled were either not responding in a timely or adequate manner, or there was not clearly documented evidence of their compliance with the terms in enforcement orders. And without any of this documentation, there's simply no way for EPA to determine that enforcement orders are being taken care of.

To conclude, the management team at EPA has acknowledged the problems that I've discussed with you this morning, and has indicated its intention to take appropriate corrective action. The proposed restructuring of the agency's enforcement program is not at this time definitive enough for us to evaluate whether it will help remedy the problems that I've discussed. We're going to continue to perform audits of the EPA's enforcement activities and other EPA programs, and express our opinion as to the adequacy of these actions. This concludes my statement, Mr. Chairman. Thank you.

Senator REID. Do your associates have statements?

Mr. MARTIN. No, they don't, Mr. Chairman.

Senator Reid. I appreciate the statement that you gave. I think the examples that you've given are excellent in that it allows the committee something specific to look at rather than generally saying a good job or bad job was done. Too many times we deal with generalities and not enough specifics, and I appreciate the specifics that you have given us in your statement. Your full statement will be made part of the record.

I think the examples that you've given regarding the ultimate monetary assessment was based on how much it would cost to prosecute the case. That's what I talked about earlier with Mr. Habicht. Those kinds of things, the examples that you gave, do not act as a deterrent. When you know that you are facing a $4 million fine but that you can go in and work something out with the agency, because if you make me pay the $4 million you're going to have to spend this much time pursuing your case, and it's going to cost you all this money, therefore, you shouldn't do it. And, well, you're right, so we'll fine you instead of $3 million, $90,000. It's not a bad deal and it doesn't act as a deterrent. So your report from that perspective was excellent.

You give examples of fines that were calculated against violators that were only a fraction of the amounts that could have been computed. I recognize that there are times when for a lot of different reasons you have to work out deals. Prior to coming here, I practiced trial law and compromises are just that. I also was the chairman of the State of Nevada's most important agency, the one that controlled gambling in the State, the Nevada Gaming Commission. And we at one time issued the largest administrative fines in the history of the Country. And even that was a compromise, arriving at those figures.

So you would acknowledge that not always the maximum should be or can be assessed, is that not right?

Mr. MARTIN. Most certainly, Mr. Chairman.

Senator REID. Did your review find any evidence of impropriety in any of the penalty reductions?

Mr. MARTIN. Well, by impropriety I would guess you might mean action on the part of the persons doing the mitigation of the penalty, and the answer would be no. However, we are extremely concerned when we find, for example, penalties assessed initially at millions of dollars being reduced to thousands of dollars, with not a single explanation in the file as to why that occurred. Most often when we asked why there was no documentation, the most common answer we were given was that these were complicated matters that only attorneys could understand. And so, it would be very difficult to put anything in writing.

That something's not right.

Senator REID. I think that what we're saying here, is not that anyone is doing anything dishonest, but that certainly people simply aren't doing their work. And, in the business in which we're engaged, you have to do away with not only what is bad, but what appears to be bad. And if they're inadequate explanations, it's too difficult to explain because it's a legal problem, or the attorney's gone now and working for some other agency, it leaves suspicion there that there was something that took place that shouldn't have, even though that may not have been the case.

So, I'm sure that Mr. Habicht is listening very closely, and when he reports to me in January as to some of the work that's going to be done within the agency to improve the process, I would hope that, as a very minimum improvement, that whenever there is a settlement made, there is a good explanation as to why that settlement was made.

Mr. **Martin**. And that's certainly our hope, too, Mr. Chairman.

Senator **Reid**. I started practicing law doing insurance defense work, representing insurance companies in automobile accidents, slip and fall cases, those kinds of things, and whenever you wrote to the insurance company to get money to settle the case, that was one of the things I learned as a young attorney many years ago, you had to make sure that the insurance company had all the documentation as to why a recommendation was being made, what the adverse verdict range would be if the case were tried, the type of witnesses you had. You give a good explanation as to why you were recommending settlement of the case. And that's what we're talking about here.

Mr. **Martin**. Yes, that's correct.

Senator **Reid**. One of the things that we've talked about, and I talked about it in my opening statement is that there may be insufficient oversight by EPA Headquarters or their involvement on a case-by-case basis of these penalty actions. Do you have a comment in that regard?

Mr. **Martin**. We think that's definitely the case. We believe that EPA in many cases, actually, and it's not just limited to this matter we're discussing today, if it would follow its own procedures, would eliminate many of the concerns that we have. For example, if in EPA's penalty policy where there are requirements that economic benefit be calculated, that a gravity component be calculated, and where the initial penalty itself does not even consider these factors, and so you begin with a penalty that you can't quite figure out how it was calculated to begin with and then that is then passed on to headquarters with inadequate documentation. It's virtually impossible for headquarter's managers to understand how the process has evolved, and then when Justice Department is involved it's even more insignificant information. So, the whole issue of EPA's Office of Enforcement, mainly, being more directly involved, as far as we're concerned, is critical.

Senator **Reid**. We have a Superfund site in Nevada on a little river called the Carson River. That means almost nothing to just about everybody in this country, because the Carson River is not a river that anyone knows about. It's in an area that's basically with few people in it. But when you talk about the Chesapeake Bay, it doesn't matter if you live in Carson City, or Omaha, or Miami, or Baltimore, it's something that people recognize as being very important to this country, the Chesapeake Bay. There have been books written about Chesapeake Bay. So, when the Environmental Protection Agency is concerned about something in the Chesapeake Bay, the world's watching, so-to-speak. And your audit report on Chesapeake Bay is critical of the Environmental Protection Agency's oversight of enforcement activities in Chesapeake Bay. Is that a fair statement?

Mr. **Martin**. Oh, absolutely.

Senator **Reid**. Even when pollution was serious or longstanding we find that penalties were not assessed, or assessed only in very small amounts. What was EPA's response to your report, and would you comment on their responses?

Mr. MARTIN. I might describe their response as supportive but elusive. We find, generally, that EPA management rarely disagrees with the facts that we develop in our audit work. Most often they are more reluctant to agree with why things may have occurred the way they did. And then while they recognize that actions need to be taken to improve, its often times difficult to pin them down on exactly what they're going to do to improve things.

So, the answer, Mr. Chairman, is that, yes, EPA acknowledges problems, they acknowledge improvements are needed, but we work in an area that really when the rubber hits the road, we need to know exactly what's going to happen to make the situation better. And that's sort of where we are right now. We're waiting for that detailed plan as to what EPA is going to do to make things better.

Senator REID. Do you have any indication of whether the problems associated with the Chesapeake Bay violations are unique, or whether they're typical of enforcement problems within the agency?

Mr. MARTIN. The trend of all our enforcement work is that EPA's enforcement problems are generic, that you can go from media to media, Chesapeake Bay to audit work we're doing right now on the Great Lakes, to other great bodies of water that would probably be familiar to all of us. We believe we're seeing the same systemic problems. I mean, you're talking about inadequate enforcement, you're talking about delegations to States that may not have the will to enforce, for example, against municipal violators who's own discharge systems may be fed by large industrial complexes that they don't want to enforce against because it would mean an economic problem to them. We see those as generic problems that are not necessarily confined to the Bay.

Senator REID. What could EPA have done to increase the effectiveness of enforcement actions against facilities around Chesapeake Bay?

Mr. MARTIN. Well, for example, one simple thing would be, again, following its own policy, it would be progressively stringent enforcement actions against identified violators. But instead we found in examples that I've given you, where the violators even after years and years, and years of violations perhaps were never assessed a penalty, let alone a more progressively stringent one. So, again, we're getting back to the basics of EPA following its own established procedures.

Senator REID. One of the things, as an oversight committee, that we're concerned about, is how can we measure success in enforcement programs? How can we do that?

Mr. MARTIN. Well, I think your earlier statements, Senator, about bean counting go a lot closer to the heart of the problem than most people may realize. I think you're focusing truly on the real issue here.

What documentation do we have that anything is being done to clean up the environment? We are now beginning a series of audits on pretty much exactly the subject you're talking about. We're going to be looking at consent agreements. And we're not going to be satisfied with the idea that a facility is in compliance with, perhaps, the consent agreement, which we find sometimes is rather than being tightened up over times, is actually loosened up over time if a facility continues to be a problem facility, because that helps EPA. It gets that facility off violators lists. It lessens the pressure on the region to deal with that facility. There is sometimes built in incentives why EPA people down in the regional levels may want a facility to disappear off lists, because it eases the pressure on them.

We're going to start examining what actually is happening with consent agreements, for example. Is there any measurable result in the environment being cleaned up, or are we kidding ourselves?

Senator **REID**. One last line of questions. One of the best ways for a Federal agency to lower its budget, lower its responsibility, to lessen its workload, you just say, let the States do it. That way everything looks better on paper. What is your view of the effectiveness of EPA's oversight of State enforcement programs?

Mr. **MARTIN**. It varies from region to region, and State to State. Some States have, apparently, a stronger commitment on their own to enforcement activities. And so, it's easier for EPA to deal with them because they're more in tune with what EPA wants to accomplish. Others are more difficult. You can also fine regions, and unfortunately, we think that the Philadelphia Region is one of those regions where because of what Mr. Erickson referred to, I think—I forget his exact words, but the idea was a fragile relationship. He might have even used that term. There is a fragile relationship. On one hand EPA has got to seek the cooperation of the States, yet on the other hand it's got to beat them over the head if they're not doing a good job. That's a difficult thing to pull off. And we think that there are regions who are falling short of being able to pull that off effectively. And so, what you wind up with is inadequate EPA pressure on a State, then the State being inadequate in its activities down lower.

We've actually had regional people come to us and say, look, while we can't publicly acknowledge the value of your audit report, or the accuracy of it, we want to tell you privately that you're right on target. And we're going to take this audit report now and go and present to the States involved to let them know that there's a hammer here that the EPA now has to deal with. So they're going to be able to use the audit report basically as a tool to try to be more stringent with the people they've got to work with. And certainly, we don't object to that, but it does seem to us a rather odd situation that the agency would not be more aggressive in its own right, although we're happy to help them.

Senator **REID**. Mr. Martin, I would like to express my appreciation for your testimony here today. And speaking as only one United States Senator, I think that the taxpayers got their money's worth today. I think this report of yours was outstanding, and I'm sure it will, in the short term and the long term, be very important for this Country.

Thank you very much.

Mr. **MARTIN**. Thank you, Mr. Chairman.

Senator **REID**. Panel III, Ms. Ann Powers, Vice President and General Counsel of the Chesapeake Bay Foundation, and Ms. Joan Bernstein, Vice President and General Counsel, Chemical Waste

Management, Incorporated. Ms. Powers is from Annapolis. Ms. Bernstein is from Oak Brook, Illinois.

Ms. Powers, would you proceed, please?

Ms. **Powers**. Thank you.

Senator **Reid**. Your testimony will be limited to seven minutes. Any time that you don't have, your complete statement will be submitted for the record.

STATEMENT OF ANN POWERS, VICE PRESIDENT AND GENERAL COUNSEL, CHESAPEAKE BAY FOUNDATION, ANNAPOLIS, MD

Ms. **Powers**. Thank you, Mr. Chairman. I appreciate the opportunity to appear this morning, and I certainly appreciate the kind comments about the Chesapeake Bay.

It is a valuable National resource, something that we, on the Bay, are working hard to protect. That's very difficult, however, when you consider the many sources of pollution. As I point out in my testimony, which I won't read in detail, we have many problems. We very much recognize, on the Chesapeake, the need for coordination among programs and the need for a geographical targeting of our resources. For that reason, we wholeheartedly support Mr. Habicht's statements concerning geographical targeting of enforcement activities.

I'd like to make a couple points about enforcement on the Chesapeake Bay, and about EPA enforcement in general. First, I think one of the major problems that the agency has is simply a lack of will and commitment, or at least it has had in the past. That is to say, an enforcement mindset. I was very pleased to hear Mr. Habicht talk about the commitment on the part of the Administrator, and upon Mr. Habicht's part to improved enforcement, because I think that is absolutely essential. It is only when you have that kind of commitment at the top that the programs are assured of being carried out. In order to carry them out, of course, you do need an appropriate structure. And I think that some of the changes that are being made at EPA will help us to see results in the field. It is important not only to change the structure, but to make sure that there is sufficient staff available, and that those people have enforcement backgrounds. I think it is critical that we establish offices, staffed by folks who have litigation experience, and who have investigative experience to make sure that the enforcement is done by enforcement professionals.

Another important point is that we must have enforcement at the State level improved. EPA cannot do this job on its own. By my general calculations, we have somewhere in the neighborhood of 5,000 direct dischargers, that's 5,000 NPDES permits on the Bay. There are, probably another 12,000 industries discharging to sewer systems, and that is only the water program. So that there's a vast amount of work to be done out there and EPA cannot possibly do it all. Getting the States to improve their enforcement programs is a difficult task. You're dealing with sovereign entities with their own political realities, their own political considerations. But EPA must take as stringent action as possible to make sure that the States are living up to their own commitment. Unfortunately, that is not necessarily always the case. EPA chimes in with too little, too late, when the States don't do adequate enforcement.

I have suggested one approach in my printed material, in my testimony, for a cooperative Bay effort, to try to bring together the enforcement officials to agree on the major enforcement initiative, and then to divide the responsibility for carrying it out. I think that that can be a workable and useful tool to get a better focused enforcement program on the Bay.

There are several points that I think we need to keep in mind when we're talking about enforcement. First of all, it is extremely difficult to judge success. I have spent five years, now, working on the Chesapeake Bay and I have a very difficult time telling you how good the enforcement program is there. I can tell you what EPA says its statistics are. It's very hard to gather State statistics. It's hard to compare them across the States. And you're never sure what criteria people are using to judge success.

If you look only at the NPDES permits, as I said, we've got about 5,000 of them on the Bay, the first cut is that the agencies and the States focus on the majors, the major industrial and POTW dischargers. That means there's probably 329, somewhere in that neighborhood when I last looked at the statistics, so right away, they are focusing on only a small handful of the industrial permits. Then they look not at non-compliance, at instances of non-compliance, but only at significant non-compliance, as defined by EPA. That, again, reduces the universe that they look at. And then the key becomes the exceptions list. So, right at the moment you're looking at perhaps a handful of companies on the exceptions list. Those are companies that have been out of—in significant non-compliance, as I recollect, for more than two quarters and have not been brought back into compliance. Well, that's a handful of cases out of 16,000 dischargers out there. In fact, I saw some old figures for 1985 that showed that the discharge monitoring reports submitted by industries in the Bay area showed that there were 16,569 permit violations, just at 136 majors. But only a handful of those, only 200 of those 16,000 met the significant non-compliance standard. So that's barely 1 percent of the violations were viewed as significant enough in order for them to get on EPA's major report. So I think that we certainly have to keep in mind that we're looking at a very small universe. In addition, we're not looking at the minors.

And, unfortunately, we don't think that the agency is doing an adequate job at this time on pretreatment enforcement. We did a major study of pretreaters on the Bay and found that there were serious problems at all levels of government. And yet, in its recent pretreatment initiative, when the agency announced suits and actions against pretreaters, there were only three in the Bay and they were administrative orders, for the most part, against smaller municipalities. We were quite disappointed with that result.

I concur with a great deal of what the Inspector General had to say about enforcement in Region III. There is certainly not the kind of oversight that we would like to see. There's certainly much room for improvement.

One other item that is a topic for another hearing, perhaps, but should be kept in mind is, that when we talk about enforcement we're only talking about enforcement with permit limits. And there's no assurance that the permits themselves are as stringent and as strong as they ought to be. So, at this present time there are tons of pollutants that are being dumped into the Chesapeake Bay legally, under legally issued permits. That's always a factor, I think, when we're thinking about cleaning up the Chesapeake.

Those conclude my prepared remarks, and I will be happy to answer questions.

Senator **Reid**. As soon as Ms. Bernstein gives her statement, we'll ask you some questions.

Would you please proceed?

STATEMENT OF JOAN Z. BERNSTEIN, VICE PRESIDENT AND GENERAL COUNSEL, CHEMICAL WASTE MANAGEMENT, INC., OAK BROOK, IL

Ms. **Bernstein**. Thank you, Senator.

I'm fortunate enough to have had the opportunity for public service in the legal departments of both the Department of Health and Human Services and the Environmental Protection Agency. I mention it, because it lets you know that I'm an enthusiastic member of what we call the EPA Alum Club. That "membership" lets us commend the Agency when there's been success, and it also lets us carp and complain about how much better we did things in the old days when we were there.

If the agency had a family, if Federal agencies had families, I'd like to think of myself as the Jewish mother of the Environmental Protection Agency, which gives me all the license in the world to come forward here today among true experts in this area, and offer a few comments of my own. And they will be few, but I would like to make them, as well as a few suggestions for improving the enforcement effort.

But first, I'd like to say that all of us Alums, and I know Ann joins me in this, are delighted with the recent turnaround in the Agency's vigorous commitment to its enforcement effort. Out where I am, in the heartlands, the public perception of the Agency's credibility, and the Agency's commitment to its environmental mission, has very significantly improved. For me, and I think for all us, that's important.

I join with you, Mr. Chairman, in the acknowledgement that we can't go on counting numbers and beans any longer. I don't know that I have the total answer to a better way to measure enforcement success, but I know that it has to be connected to measuring the environmental benefit that comes from the enforcement effort.

Ann mentioned that there are large areas that are not even being addressed in the enforcement effort. I would note that in our area, the hazardous waste area, almost all of the enforcement has been focused on the commercial industry, which manages only 5 percent of the total hazardous waste in the United States. It's as if the Agency believes that the tip of the tail of the dog is all that it needs to wag the dog. Those enforcement efforts must be broadened to incorporate the non-commercial (on-site) sector as well. Similarly, there have been large parts of industry, like the sham recyclers and other exempt industries, for which EPA has had an enforcement policy that it has not really pursued.

My second point is that the Agency needs to set enforcement priorities that mirror and implement the twin goals of achieving pollution prevention and remediation. Those priorities need to be based on a number of factors, such as solid scientific assessment and genuine responsiveness to the public's concerns. After priorities are set, the bully pulpit available to Environmental Protection Agency officials should be used to reinforce and communicate them, not only to the public, but to the regulated entities. Because, and I guess this has been said but I'd like to say it again, we as a Country depend upon voluntary compliance in all our law enforcement. If we didn't, if Americans were not basically law abiding, the entire legal system would collapse.

I think the Agency needs to make more of a point of acknowledging how much we depend upon voluntary compliance and both encourage and reward it. A few specifics on that. The self-auditing programs that many companies have put into place, because they do want to meet the requirements, could be incorporated by the Agency into consent agreements and into regulations. In other words, an audit component would be required of a company to be in compliance with the regulation, that would specifically say, that the company will have a brief period of time to discover problems and correct those problems without obligation to report or to take any further action. That could be a very major encouragement to voluntary compliance.

A more mundane, example of what could be done to encourage voluntary compliance is in Agency inspection. Inspectors have checklists, page after page of boxes that they check off and return to the Agency. If there were a box indicating the level of compliance achieved, giving the company "a plus" or "a minus's, an "A", "B", or "C", as to its efforts to achieve a high level of compliance, that would be an encouragement. Some have suggested (and I think it's something that should be considered) establishing a profession—like the CPAs—of Certified Environmental Auditors, who would provide third-party verification of self-audits and audits that are conducted by the private sector.

In connection with EPA's reorganization efforts, it would be my personal judgment that much improvement would come from moving the enforcement and compliance function out of the program areas, back into the enforcement area. That will require reconfiguring the teams of technical and legal people, which I believe function much more effectively together. A by-product that I think is important to those of us who have the responsibilities of complying with the environmental laws, would be to separate the permitting and program functions from the enforcement function. The courts have required that, at least in the Seventh Circuit, and it should be reiterated that it's an Agency responsibility to do that.

Two more brief points, and then I will conclude my remarks. Enforceability, perhaps, should have been point number one. The Agency really must focus on the regulations. They must be clear. They must be understandable, in lay language. Ignorance of the law is no defense, but incomprehensibility, particularly if we are moving into criminal enforcement, may yet turn out to be a defense. There is an incredible proliferation of very, very complex regulations and interpretations, almost impossible to follow.

Specifically, I think enforcement personnel at the Agency should be engaged and involved in the regulation writing process so that they are thinking, the Agency is thinking, about enforceability at the time the regulations are written. Similarly, the Agency should issue implementation plans at the same time that regulations are promulgated, so people know very clearly what is expected of them.

Finally, I would urge the Agency to make greater use of techniques other than litigation. The buzz words are alternative dispute resolution, mediation, arbitration. The agency has formalized a policy that encourages the use of those techniques, but they have not generally been used in enforcement. I think they could be. There are areas, particularly where there are technical disputes, that would benefit from third-party technical analysis to cut through differences. Complex areas (that I know you've faced, Senator Reid, as I have in private practice), where there are multiple parties, or multiple issues, take so long and are so expensive to try, that the other techniques could very well shorten the time and the amount of money and effort that is spent in those areas.

Again, I have appreciated the opportunity to appear here with you in this interesting dialogue. As a company, Waste Management offers its full support to you, the committee and the EPA to the extent that we can assist in the enforcement effort.

Senator Reid. The statements of both of you will be made part of the record. They are both excellent.

I have a number of questions for both of you. Ms. Powers, I note on page 2 of your statement, you make the following statement, that I think is worthy of elaboration:

> I never know quite how to respond when an agency official tells me that they use the threat of citizen suits as a bludgeon to force industry into compliance; "We tell companies that if you don't settle with us, you'll have to deal with CBF or NRDC".

And you go on to say:

> While I'm flattered, it also seems to me very sad that I should be in a position of being a more potent enforcement tool than my Government.

You don't have to respond to that. I think the statement speaks for itself. I think that in the years to come, I would be satisfied if, in fact, the Government was someone that the polluters feared more than some non-governmental agency. So that statement speaks reams.

Ms. Bernstein, would you tell the subcommittee, if you believe this to be the case, why a company should not be penalized for reporting to EPA violations uncovered in a self-audit?

Ms. Bernstein. I didn't mean to suggest that in self-auditing no violation should be reported. What I was suggesting, Senator, was that part of the purpose of a really diligent and thorough audit program is to encourage discovery of problems and to offer an opportunity for them to be corrected. Let me give you some specific examples.

There are requirements for distance between drums, aisle space requirements, (i.e., drums must be, say, three feet apart from each other.) As you go down those aisles, there are actual measurements of them. If there is a foot missing, for example, it is my belief that the self-auditor, the auditor within the company should be able to say, the first time, "hey, look guys, that has to be three feet. And I mean three feet, not two inches less." Give them an opportunity to correct the aisle space, at least the first time. If you have to report that to the agency as a potential violation, there will be very much less willingness to go in and discover such relatively small, benign, and easily correctable, (though governed by regulation), measurements. So, I think you have to build into the audit and compliance program opportunities and incentives to discover and correct problems, because that's what compliance is about.

Senator **Reid**. Your company, in the past, has come before Congress and asked the Environmental Protection Agency to enforce the law against all landfill owners and operators, not merely the so-called deep pockets.

Ms. **Bernstein**. Right.

Senator **Reid**. Waste Management believes that EPA and the States generally do not enforce against municipalities, and small companies from where, it is argued, most contamination problems emanate. Now, this is directly contrary to the perception that most people have in the Country, that is that the EPA picks on the little people and not the big companies. Would you elaborate on this that I've just stated?

Ms. **Bernstein**. Yes. I think you're correct that many people perceive that the Agency's efforts are focused on the little companies, and they may be in areas other than the waste area. I'm not sure that my statistics apply to those other areas.

In our area, however, the agency has consistently focused upon the largest commercial companies, as I said before, and has not focused on 95 percent of the generation and treatment, and disposal of hazardous waste in this Country— that is on-site, non-commercial disposal of hazardous wastes. The agency has said consistently that while it believes that sector is subject to the requirements, it has simply not inspected or brought enforcement actions against it.

Obviously, if there is a problem with contamination, that other 95 percent has to be pursued.

Senator **Reid**. Do either of you agree with the penalty policy that the ability to pay should be a factor in setting penalties?

Ms. **Powers**. I don't have any problem considering it as one factor. I think it should be one of the very last, however, because it seems to me that if the key becomes are you going to put a corporation out of business, and you have a corporation that is not complying with environmental laws, then perhaps that is one who should not be in business. So, I think it's a useful tool sometimes, but I would not—as I said, I would make it one of the last factors to consider.

Ms. **Bernstein**. I agree with Ann. I would consider it a factor, but not a sole factor. And probably the last one.

Senator **Reid**. If either of you were the Administrator or Deputy Administrator of EPA, what would your enforcement priorities be?

Ms. **Powers**. I think my testimony outlines a couple of things that I would pursue. First, would be to try to make sure that there was a commitment at the top, and get the agency committed to a strong enforcement program, and look at the structure. I would also then try to focus on using a geographical initiative, if possible, or using cross media programs to try and target major polluters, not in just one media, but people who have problems with air, water and waste, so that we're getting more pollution out of our waters, and out of our environment, more bang for the buck.

Ms. **Bernstein**. I agree exactly with Ann's assessment of that, particularly the commitment at the top which is most important, because it trickles down not only to the regional offices, but also to the State enforcement agencies as well. That's an important message that invigorates other sectors.

I would also like to see as an enforcement priority the type of multimedia attempt that the Agency has said it intends to pursue in the Federal facilities, in other words, cross media. Don't separate the water, and the air, and the waste problems, but rather look at a total picture.

I would also encourage, if the Agency does not reorganize the entire enforcement effort, an experiment such as you, Senator, suggested in one or two regions, for comparison purposes. I think that could be very valuable.

Ms. **Powers**. Senator, if I might add to that, I think that we have to look not only in the enforcement area, but in all of our programs at cross media issues. We see that so clearly on the Chesapeake. It doesn't make any sense to transfer the wastes from one media to the other. And we see that now. For instance, we're seeing hazardous waste disposers who instead of landfilling or incinerating their waste, are diluting them and discharging them to the sewers, legally. And in the long run the same amount of waste is going into the Bay, just into the environment. It's just done over time. You might as well take a dump truck and back him up and dump it all at once. So it doesn't make sense, unless we look at these on a cross media basis.

Senator **Reid**. Would you give someone that doesn't know much about Chesapeake Bay a brief view of how it has changed in the five years that you've been working on the Bay?

Ms. **Powers**. That's a very hard question to answer.

Senator **Reid**. That's why I asked it.

Ms. **Powers**. I'd like to separate two things. First of all, the programs have improved. There's a great deal more effort being made, a lot of coordination between the States and the Federal Government. I think that we're seeing the infrastructure get better.

Now, is the Bay itself getting better? In some areas, yes. Certainly we can swim in the Potomac, or soon we'll be able to, we hope, when a few years ago you couldn't do that. There are parts of the Bay where we're seeing restored aquatic grasses; we're seeing some improvement in rockfish fishery, but oysters are at the worst level in years. We may never have a restored oyster fishery. So, although there are some hopeful signs, it's hard to say that we yet have made a great deal of progress in actually restoring the resource.

I just ask people to keep in mind that it took a couple of hundred years for it to get into the sad shape it's in, and it's going to take a very long time to restore it.

Senator **Reid**. We have some other questions, if you would agree to answer those, we'll submit them to you in writing, and would appreciate, at your convenience, getting them back to us as quickly as possible.

We very much appreciate both your time and efforts here today.

Ms. POWERS. If I might add one clarification on the initial question, which had to do with ability to pay. I think that that is, as I said, a factor to be considered. My problem with it is that sometimes when a penalty is not placed on a company because it will drive him out of business. I was not actually thinking about the other situation, and that is where you have a company, a large company, that is able to pay and sometimes a larger penalty is needed to get their attention, more so than a smaller company. So, as I said, it's not one of the major factors I would consider, but it can be useful.

Senator REID. Thank you.

Ms. BERNSTEIN. Thank you, Senator.

Senator REID. Our final panel today consists of Mr. Judson Starr, an attorney in Washington, D.C., Mr. Thomas Gallagher, a consultant, and formerly employed by the EPA from Denver, Colorado, and Mr. Donald Mielke, who is the District Attorney from Golden, Colorado.

Gentlemen, we appreciate your patience in waiting through the other witnesses. Mr. Starr, we would appreciate it if you would go first, Mr. Gallagher, second, and you, Mr. Mielke, do cleanup.

STATEMENT OF JUDSON W. STARR, ESQ., VENABLE, BAETJER, HOWARD & CIVILETTI, WASHINGTON, DC

Mr. STARR. Mr. Chairman, thank you. Having spent most of my professional life at either the Environmental Protection Agency, the Environmental Law Institute, and most recently, at the Department of Justice, where I devoted my attention to developing and directing the environmental crimes program, it's a pleasure for me to be here to discuss the topic at hand.

What I would like to do, with the Chair's permission, is to skip the reading of my statement, which I have submitted for the record, and to use my alloted time to state three principle points.

One of them is the observations that I've been able to make since I left the Government, on the impact of the environmental crimes program on today's regulated community. Of course, when I left the Department my ultimate fear and the fear of my employers was that what had been accomplished at the Department of Justice and at EPA would turn out to be largely irrelevant when you got out beyond the Beltway. Well, to my surprise the impact of the environmental crimes program is even greater than I had ever expected to see. There are two major concerns within the regulated community that I've been able to witness in the year and a half or so that I've been out of the Department. Superfund, obviously, with its unlimited liability and unknown liability is a concern for every member of the regulated community.

But I would say that, number two, and close to number one, is criminal enforcement. I think that there is a general feeling among the regulated community that it's only a matter of time before the knock occurs at the door. I was surprised to see the impact which the criminal enforcement program had in the regulated community.

My experience had always been that some felt that it was better not to know from top management on down what was going on with regard to environmental compliance out in the field. It was simply a function of how corporations operated, that it was better not to know, not to discover, not to learn what the problems really were, that they would somehow take care of themselves, or be ignored, or if the civil lawsuit and complaint came, it would just be a matter of a fine which would then be passed on to one's customers.

But I think the needle has shifted on that scale as a direct result of the criminal enforcement program, top managers, from CEOs on down, particularly those involved in the environmental compliance field within corporations, are saying that the "it's better not to know" approach is no longer a valid one. In fact, those managers are now saying "we must know what's going on out there in the field.

I was also surprised to learn the degree to which corporations, when caught, are willing to sign over a check if that means the end of a criminal case. The money does not matter. It is the focus in the criminal enforcement program on individual liability that creates concerns. I had the opportunity to sit in a conference room with a CEO of a major Fortune 40 company, and explain that the chain between him and the wrongdoer on the ground was five levels; that there were five people separating him from the mid-level manager out in the field at one particular facility. When he realized that it would be fairly easy for the Government to walk up the rungs of that ladder to him, environmental criminal enforcement became a reality to him.

The biggest fear, however, is not necessarily even individual liability or money. It is, in fact, debarment. It is, in fact, the possibility that one could lose one's contracts. Many States now have enacted good citizen statutes which basically say that if you are convicted of a crime, or in some cases, if you're under investigation for a crime, you may lose your right to continue to do business and lose your permit.

For instance in one case, if the investigation had concluded with a conviction against the company, it would have lost its licenses in 12 different States where it had facilities. For one major Government contractor I've had the opportunity of working with, debarment, particularly under the Clean Water Act and the Clean Air Act, where it's automatic, is the major threat. It is not necessarily the lawsuit itself. For another company which receives agricultural subsidies under the Commodities Credit Corporation, the CCC program, the threat that it would lose its ability to operate in that program is the greatest threat. It is not the money, nor is it even individual liability.

The concern, however, is whether, in the current atmosphere, reason will predominate. There is a concern, given the fact that the major decisionmakers, be they at the District Attorney's level, State Attorney General level, or U.S. Attorney's level, are no strangers to the headlines that these cases can bring, over whether reason will predominate when a case is under investigation. I submit that it does and will, but that is a great concern.

There is also a concern caused by the lack of a bright line between what constitutes a civil, criminal, or administrative case. One case may fall as an administrative case and on the same facts may turn out to be a criminal case. That gives the regulated community very little guidance and causes it concern.

But I would, with those comments in mind, saying that while I was with the Government, I and those with whom I worked totally underestimated the impact in this large area of environmental compliance that the efforts of a relatively small group and small program has had. More attention is given to the compliance of the laws and more respect for the environmental laws. EPA is taken significantly more seriously as a result of the criminal enforcement program, and, I think, thought of in a different context than before the criminal enforcement program existed.

A word now, if I may, about the criminal investigators. They are the key, the cornerstone, the foundation for all else that follows in the criminal enforcement program. There is no better, more dedicated, loyal, professional, highly motivated group, I would submit, in Government, sir, no group that has ever accomplished as much as what these gentlemen and women have accomplished. However, too much has been asked for them to do, and they are too few to do it all. It's as if one created an army, sir, and said, okay, let's start off with the generals, and now we've got the colonels and the lieutenant colonels, now we've got the captains, majors and lieutenants. All those positions are filled. Now, we turn around and we look and see there are no foot soldiers. That's essentially how the criminal enforcement program on the investigative side was created. I'm not suggesting that it's top heavy by design, but it's been asked to organize itself in a professional manner with too few people. I submit that this is not their fault, but is the fault of those who have provided too few personnel.

I am, also personally, concerned that for largely bureaucratic reasons in the name of departmental integration, the environmental crimes investigators are being, again, underappreciated. They have to be held accountable, but the measure is against and by what standard. Let's look at their world, for a minute. A lead comes in; they measure it; they investigate it. The fact is that most leads do come in off the street, they do not come from within EPA itself. The investigators have no idea where it will go, where it will take them, what statute the case will be eventually brought under. They have no idea what they'll find. They have no idea what the ultimate case will even look like. They don't know whether they'll need a Grand Jury document. If they do, they then have to go to the Department of Justice, a significant turn in how a case is developed. They don't know whether they'll need to get testimony, under oath, or through the Grand Jury. They don't know whether they'll need to obtain documents either through a search warrant, or a Grand Jury subpoena; again, they have to turn to DOJ. They don't know whether they'll need the significant laboratory support and technical support that's required, or whether they'll need immunity for witnesses. The fact of the matter is that they don't know what the case will look like.

In the traditional criminal case, sir, you know what happened, you're just trying to figure out who did it. But that's not the case in the environmental criminal context. You may know who did it; you're trying to find the corpus delicti. You're trying to find whether those drums, in fact, were there over 90 days, where they came from, and what the process was by which they were generated. All questions which cannot be answered without a significant investment of time. And while time is being invested, EPA's investigators are speaking the language other prosecutors understand.

Agents feel that by virtue of their training and background and experience they have more simpatico from others within their own agency who turn to the prosecutor at the Department of Justice. It's not all that simple. The investigation may be handled by any one of the 94 U.S. Attorneys' Offices. It may be handled by any one of the FBI Field Offices. The fact of the matter is then, it is difficult with all these players involved to drive a consistent, coherent, coordinated policy. It's hard to see the big picture and to reconcile with particular bureaucratic requirements what a given case looks like until it is fully developed and substantial time is invested.

There is coordination by the EPA agents. I submit, that at least during my tenure at the Department of Justice, I saw those agents try harder to work with their particular regions than I saw the particular regions willing and able to work with them. I think the regions gave the investigators little guidance, no significant case referrals or leads, as I knew it, and I never saw direct support coming to the agents, though I saw the agents regularly trying to give it to the agency.

A word about proactivity. It's a very pleasant word to hear in the criminal investigative sense. It cannot be achieved without significantly increasing the resources over and above, and nearly double, what EPA has available to it now. They need to continue to respond to information off the street. If they don't, that information will be lost.

Finally, just a word about self-policing, if I might, to compliment Ms. Bernstein's comments. The real goal, I think, of the criminal enforcement program, among others, is to encourage self-policing and self-compliance by the corporations themselves and those in the regulated community. The sentencing guidelines institutionalize the self-policing approach by virtue of the benefit that they give for having internal self-policing programs. If one does self-police, however, I believe that EPA and DOJ collectively need to provide a place to go with that information so that the regulated community can have some clear guidance as to what will happen when they bring that information in. Too many people in the regulated community have said to me, okay, having discovered this, where do we go with it. And the answer is, right now if you go to the administrative side, it may end up as an administrative matter. If you go to the criminal side, the same facts may end up as a criminal case. It's left too much to happenstance.

And with that, I'll be glad to answer any questions, Senator.

Senator **Reid**. We will ask questions after other witnesses have completed their testimony.

Mr. Gallagher.

STATEMENT OF THOMAS GALLAGHER, CONSULTANT (RETIRED DIRECTOR, EPA'S NATIONAL ENFORCEMENT INVESTIGATIONS CENTER), DENVER, CO

Mr. **Gallagher**. Thank you, Mr. Chairman.

Thank you for the opportunity which you have given me to comment on EPA's enforcement initiatives. I intend to summarize portions of my statement this morning, but would appreciate it if the written statement could be entered into the record in its entirety as if read.

For eighteen and a half years prior to March, 1989, I was Director of EPA's National Enforcement Investigations Center. First some comments on criminal enforcement.

In my written statement, I reviewed the accomplishments of the EPA program and these are substantial. The high credibility and continuing achievements in the Nation's criminal enforcement efforts are a tribute to the men and women of EPA's National Enforcement Investigations Center, the Department of Justice's Environmental Crimes Section, the National Association of Attorneys General, the Federal Law Enforcement Training Center, the Federal Bureau of Investigation, the State Criminal Enforcement Associations, and prosecutors at the Federal, State, and local level, all of whom have worked extremely hard over the last six years to compile an enviable record of accomplishment.

The criminal investigation component of the EPA's criminal enforcement program is well-established and operating successfully. I would note, however, that a well-managed and directed criminal environmental investigation capability is but one component of an overall EPA criminal enforcement program. It is long past the time when EPA, on the highest level, should affirm an agency commitment to the criminal enforcement process as an integral part of its compliance and enforcement activities, and I am pleased to see such a commitment in the Deputy Administrator's statement. Based on my past association with him in his role as Assistant Attorney General, I know him to be a forthright and constant advocate for environmental criminal enforcement. However, this high level commitment needs to be communicated clearly and continuously to EPA's program and regional offices, other Federal, State, and local regulatory agencies, and the regulated community, until they finally believe it. EPA also needs to address other issues that are extrinsic to, but supportive of, the criminal investigation capability. These include:

Development of long-term planning policies and strategies which are reflective of probable new legislative requirements involving criminal enforcement and oversight of the development of regulations to implement those requirements which do not impede criminal investigations.

Development of a system to define clear and specific priorities and objectives to be followed by the NEIC in its management of criminal investigations, as well as EPA's regional offices when referring information for potential criminal investigations.

Definition of meaningful measures of accomplishment. If realistic measures were instituted, such as indictments, counts and numbers of individuals and companies, as official measures for accountability purposes, it would parallel Department of Justice indicators and would mandate a very close, supportive relationship by EPA-OECM with the Department of Justice's Environmental Crimes Section.

A significant expansion of the already existing outreach program to State and local prosecutors and regulatory agencies, through the Regional Associations, as well as training courses at Federal Law Enforcement Training Center. The relatively modest existing program administered by the NEIC needs to be significantly enhanced. NEIC also needs to consider the detailing of some of its special agents and technical experts to State and local entities through the Inter-governmental Personnel Act in conjunction with a badly needed increase in personnel of both of these disciplines for the agency, which I hope the Congress will consider favorably. I will comment on this further.

In connection with this recommendation, the NEIC needs to expand its already strong capabilities for dissemination of compliance intelligence and compliance information across all program areas to more fully support the State and local criminal investigative agencies, as well as its own Office of Criminal Investigations.

Having said all this, the larger issue reflecting EPA's commitment to criminal enforcement over the past six years is the demonstrated imbalance between supply and demand. The program is woefully underfunded and undermanned, even by EPA's own critical mass assessment, which, I believe, was also grossly under estimated. There is, at present, approximately one criminal investigator per State. Through fiscal year 1989, there were no workyears specifically assigned for the technical and scientific personnel who are necessary to virtually every successful criminal case preparation.

Consequently, I can endorse wholeheartedly the concepts in a draft of a bill proposed by Senator Lieberman which I have been given the opportunity to review. Substantial increases in the number of criminal investigators, as well as the technical and scientific experts, are necessary for the NEIC to meet its responsibilities in managing environmental criminal investigations. I'm also pleased to note that the draft bill, as well as the Deputy Administrator's statement, address the need for a significant expansion of the training capabilities at NEIC and FLETC which have been so efficient in leveraging State and local activities in criminal enforcement.

A few remarks regarding EPA's civil enforcement program are appropriate. Historically, issues addressed by civil enforcement have involved design and installation of treatment technology to achieve effluent and emissions limitations, as well as assignment of liability for environmental violations.

It is my belief, however, that the issues to be litigated through the civil enforcement program in the 1990s will differ substantially. These issues will address the following characteristics. (1) Evidence of improper conduct will involve operation and maintenance practices as well as interpretation of ambiguous environmental regulations. (2) Cases will emphasize evaluation of continuous compliance. (3) The patterns of conduct for potential violations will be technologically sophisticated and require the ability to analyze and evaluate complex paper trails. (4) These cases will take long periods of time to develop and will require large teams of attorneys, technical personnel, document control specialists, and computer support. (5) More of these cases will involve the need for trained witnesses, litigation tested evidence-gathering procedures, and legal specialists who are trained in litigation. (6) And I might add, the same characteristics apply also to criminal cases, with the added burden of proof of proving will and intent.

In my opinion, EPA should prepare to meet these litigation challenges in civil enforcement in a proactive way through organization of compliance information across all major program areas to permit efficient targeting of probable violators. Targeted compliance inspections should emphasize the use of multimedia environmental auditing techniques to demonstrate continuing compliance or noncompliance with all applicable regulations by the source.

The capability to organize information for compliance inspection targeting and to conduct cross program inspections using environmental auditing presently exists within the agency only at the NEIC and a few regional offices. These procedures have alreadly been successfully applied in assessing compliance by Federal facilities. It is feasible and timely to apply these procedures to the entire civil enforcement program across all program areas.

However, as is the case in NEIC's approach to the criminal investigation program, to do this successfully requires organizationally dedicated groups of trained specialists with diverse technical, scientific and investigative backgrounds who must work in a coordinated and cooperative team approach. A major training program in this regard is necessary for agency and State compliance inspection personnel.

At the present time, the agency, through its Regional Environmental Services Divisions, has a cadre of several hundred field and laboratory personnel who could be trained in compliance inspections and environmental auditing techniques across all program areas to provide this support for civil enforcement case preparations. If this could be accomplished, it would not disrupt the existing technical capabilities in the agency's program offices. It would have the added benefit of freeing additional technical and scientific experts at the NEIC to concentrate on criminal investigations. NEIC could also serve as a focus for computerized compliance information management and dissemination for targeting and intelligence purposes, as well as a training center for EPA's civil inspectors in environmental auditing and case preparation litigation support procedures.

I hope that the observations and suggestions offered in my statement will be considered by the agency and this subcommittee in meeting their common goals for a firm, fair and responsive environmental enforcement program.

Senator Reid. Mr. Mielke.

STATEMENT OF DONALD E. MIELKE, DISTRICT ATTORNEY, FIRST JUDICIAL DISTRICT ATTORNEY'S OFFICE, GOLDEN, CO

Mr. Mielke. Thank you, Mr. Chairman.

I'm Don Mielke. I'm an elected District Attorney in a jurisdiction of about half a million people just west of Denver, consisting of Jefferson and Gilpin Counties. The full text of my remarks are before you, which I ask to be part of the record. I just want to summarize some of the important points of those remarks. I first want to thank you for your gracious invitation to a local prosecutor to appear at these hearings.

Mr. Chairman, our citizens have increasingly come to expect local officials to deal with hazardous material crimes.

There's a growing public sentiment that persons and corporations who illegally dump hazardous materials are as dangerous to society as traditional street criminals, and ought to be treated as such. Their concerns are well founded. Who knows what cancers, birth defects and other problems may appear years after an environmental crime is committed.

Mr. Chairman, many local prosecutors across the Country are becoming more sensitive to the need for vigorous enforcement of our pollution laws. Unfortunately, only a small number of investigators and DAs are trained in the special techniques required for successful environmental prosecution. Mr. Chairman, even the most able prosecutors and well-trained investigators need the strong support of a sophisticated laboratory, a resource which is rarely available at the State and local level.

One case that I had in my office was investigated by local law enforcement, they then sent a sample off to our State Department of Health. The sample was tested and was thrown away. And with it, went our case. Local and State health departments are not trained in forensic techniques.

For the past several years, local law enforcement officials have found a real friend in the Environmental Protection Agency. The agency's National Enforcement Investigations Center, the NEIC in Lakewood, Colorado, has provided us scientific support and investigative leadership which has made a number of local criminal prosecutions possible.

Unfortunately, the resources of EPA have been strained beyond the breaking point, both in the investigative and the scientific support areas. With only 48 investigators to investigate the entire Country, the NEIC can only investigate a fraction of the cases referred to it. The laboratory at the NEIC is so busy that my office was forced to use a private lab at a great expense in a recent case because of that EPA backlog. I'm afraid some prosecutors will avoid these cases altogether if they are confronted with significant private lab expenses.

Even the training resources of the EPA have been taxed beyond reason. Although the agency offers an excellent curriculum for State and local officials at the Federal facility at Glynco, Georgia, only 35 local investigators have been trained over the past three years. Literally hundreds of local detectives need this program.

Mr. Chairman, now is the time for Congress to strongly support an expansion and enhancement of EPA's criminal law enforcement capability. Senator Lieberman has considered introduction of legislation which will greatly increase the number of EPA special agents. And I strongly urge your support for that measure. I think that the number of agents goes from 48 to 175, and personally would urge 200 investigators there.

Mr. Chairman, the National District Attorneys Association at our Fall Board Meeting, literally this past week on Saturday, passed a resolution urging Congress to adopt that legislation. I have submitted that to your staff, and I would ask that also to be part of the record.

Senator Reid. It will be. (See p. 140.)

Mr. Mielke. We ask Congress to make this quantum leap forward in enforcement.

The Congress also needs to consider favorable legislation which would enhance the capability of EPA labs. In a real sense, EPA lab is like the FBI lab of the sixties. Police agencies from across the Country sent scientific evidence that they could not process locally. Many cases were solved because FBI had the technical resources to perform the tests. Without the same kind of help from the EPA labs, environmental polluters have a much greater chance to avoid prosecution and conviction. And that could either be by increasing the lab at the NEIC or having the regional labs handle criminal matters.

Mr. Chairman, as the subcommittee considers the priorities for environmental enforcement, some people may suggest that the best way to attack environmental law violations is through the civil process. My experience is, they are wrong. Some polluters consider the civil injunctions and fines just to be the cost of doing business. They cannot pass the personal fine or the jail time to the consumer, or to the bottom line.

It wasn't really until potential criminal penalties were introduced that true polluters started paying attention. In response to Senator Lieberman's comments earlier, I believe it has had a great deterrent effect. With the effectiveness of the criminal process in mind, I am pleased to tell you I've never seen a more effective Federal operation than the NEIC. Its combined skilled investigators and scientific support has been a national asset which has been responsive within the limits of its current resources. I strongly encourage the Administration to preserve that and to keep it in the present organizational structure.

In response to the Chairman's question earlier about physically separating persons and personnel, I've only heard rumors that there was a possibility of the investigators being separated from the laboratory, and I would urge Congress to resist that.

There is a communication gap, Mr. Chairman, in criminal law enforcement in environmental crimes. Like DAs have created for drug and child abuse, there needs to be a National center for the local prosecution of environmental crime, so we may compare techniques and not reinvent the wheel in all cases.

I've outlined in my remarks some concepts, also, for your consideration. Fine sharing, such as in California and Ohio, where the State shares those fines with the local entities; model State statutes, because in some cases some States do not even have felonies in the environmental area; the EPA local task force idea, where I think the NEIC investigators now have a task force in Seattle, and that needs to be expanded; and also, we must consider civil forfeiture actions under environmental laws.

Also as to the idea of a waiver of sovereign immunity, Mr. Chairman, I'm pleased that House Bill 1056 passed the House overwhelmingly, but I don't believe there's any Senate hearings now on its counterpart, Senate Bill 1140. We believe that there needs to be a waiver of sovereign immunity at Federal facilities and within Federal enclaves. The Federal Government and Federal contractors and their employees who have concealed themselves behind the cloak of sovereign immunity should become fully accountable to the public, even to the extent they become subject to criminal sanctions under existing State environmental laws.

In closing, Mr. Chairman, I think the day will come when the investigation and prosecution of environmental crimes is commonplace. As our constituents at every level become increasingly aware of the immediate and long-term hazards posed by criminal polluters, you and I will be expected to develop creative and effective ways to approach the problem. I sincerely hope that ours will be the generation of public officials which is remembered as the first to fully act upon the realization that the environment itself can be a crime victim.

Thank you very much for the opportunity to appear here today.

Senator **Reid**. Gentlemen, I think it's commendable that three lawyers were able to limit their time as much as they did. That's great.

I think that the testimony that each of you gave was unique, and will be very helpful in formulating oversight responsibilities of this committee to review what the EPA does and doesn't do. I think that it's important to note, Mr. Starr, the statement that appears in your written testimony, on page 6, where you say,

> Few people know that since 1982 over 565 indictments have been brought, over 432 corporations and their officers and managers have been convicted, over $26 million in fines have been paid, and over 270 years of jail time have been imposed, of which over 100 years have actually been served.

That's a statement that hasn't been made yet today. We've been sparring on the fringes, and haven't gotten to specifics. And that's one of the concerns that I have about hearings like this, and that's why I appreciated the review of the audit that we had that got into specific cases and talked about specific cases rather than generalities.

What we're talking about here does deal with real people, does deal with businesses who are trying to survive, and as a result of that are trying to cut corners not only in the environmental problems that they may create, but in many other areas. So, your testimony, in all respects, has been most helpful, and I direct this to all three of you.

I believe it was you, Mr. Starr, that talked about the problems that companies have trying to understand what the law is. And I'm sure that is a problem. I can remember being in a rural community in Nevada talking to a member of a very small police force, when over the radio came a warning that some hazardous waste would be passing through town. He said to me, why tell us, we wouldn't know what to do if something happened anyway. And that's the way that many, many law enforcement people, not only in rural America, but in the cities, find themselves when it comes to enforcing environmental protection laws. It's different than arresting someone for burglary, bank robbery, or other types of crimes that we know more about. This is a growing field, people violating the law in the Environmental Protection Agency.

When I went to law school, and I went to a large law school, I don't think you could have taken a course in environmental protection law. I feel confident you couldn't. I don't think it existed then, and that wasn't too many years ago. Now, we have entire law firms that that's all they do is deal with the environmental laws of this Country.

Having said that, do you think that one of the things that the EPA should look at, and the purpose of this hearing, is to bring more sense, to bring more direction to enforcing these laws. And I'd like a response from each of you, because you each have approached this in a different way. We should have, maybe, alternative proceedings. One of the growing fields that we have in the civil litigation area is agreeing to more arbitration, having retired judges. Another method, retired judges are hired and there's a stipulation entered that whatever the judge decides both parties will be bound by it. The purpose of this, of course, is to speed up proceedings. Do you have any ideas in this field where we might be able to look at unique, or maybe not so unique ways of speeding up the process?

Who wants to be first?

Mr. **Gallagher**. Senator, I know that EPA does have an experimental program of alternate dispute resolution cases. I believe that each region, as of last year, was to nominate at least one of its enforcement cases, civil enforcement cases, for potential alternate dispute resolution techniques.

The agency, while I was there, and I'm sure, still under Mr. Reilly's and Mr. Habicht's leadership, is very concerned about the long amount of time that goes into processing both administrative and civil enforcement cases, which sometimes takes years. The potential for mediation, arbitration and the kind of structure that you have referred to in terms of Federal judges serving informally as mediators is there, especially with the kind of backlog of cases that EPA is continually facing. The traditional approach to this was to ask for more and more lawyers, in order to liticate this backlog through the court system, which is already overloaded. The potential for alternate dispute resolution techniques is extremely high, given the identified environmental violations in the administrative and civil area.

I couldn't endorse a program like that, however, in the criminal enforcement area. I do think that it's very important, particularly, at this early stage of development in environmental criminal enforcement that the courts, themselves, the United States Courts and the State and local courts, send that judicial message clearly to polluters about the penalties associated with criminal violations, and the deterrent value that would be associated with wide publicity of those convictions as well.

Senator **Reid**. Before the other attorneys respond, I would say in regard to the criminal enforcement, in other areas of criminal law we are doing things to, in effect, speed up the process. In juvenile criminal proceedings we have hearing masters that have speeded things up. In the Federal system, we developed a magistrate system. The purpose of that was to speed up discovery process in criminal cases. So we have been doing it in the criminal field, doing alternative dispute remedies in the criminal field.

Mr. **Starr**. If I may address that, Senator. I can recall a particular case. One doesn't forget Bayou La Batre, Alabama. It's about as far in the bayous as you can go. It was a shrimp community. And I know EPA, with funding, built an enormous wastewater treatment plant which, during the shrimp processing season, functioned adequately. Off season, the community of 16,000 went to a community of 200, and the wastewater treatment plant failed to operate during that period of time. It just couldn't stand the fluctuations. In that situation EPA, with the Justice Department, boxed this community into what seemed to be, by the admissions of all sides, an imponderable problem that no one could resolve. There seemed to be no answer to it. I can see that case greatly benefiting the alternative dispute system.

But that is not the kind of situation that makes a criminal case. And let me try to approach your answer from this direction. Do I see any novel ways to speed up the process? I talked at some length in my written statement about a voluntary disclosure program. To a degree, a program such as the Department of Defense's voluntary disclosure program in the defense procurement field, has had some measure of success. The Department of Justice is critical because it feels the program is administered too much by the Department of Defense, and that one is basically given immunity from prosecution by the Department of Defense, and that DOJ is not involved; so there are some turf issues over DOD's disclosure program. But despite these criticisms, basically, if defense procurers discover wrongdoing, they have a place to go, an office, a person with some guidelines as to how they will be treated.

If EPA were to consider designing such a voluntary disclosure program with clear guidelines and rules as to how it would function, a separate and identifiable office, a place for the regulated community to take its information, I think it would have a radical impact up and down the administrative civil and criminal chain upon how the regulated community acts.

First of all, if the regulated community has the opportunity to disclose information that they discover voluntarily, and they don't take advantage of it, the question of what a good criminal case looks like becomes more defined. Voluntary disclosure will help the criminal program focus on those who fail to take advantage of the opportunity EPA has offered. With some sweeteners to businesses to participate, not necessarily that immunity will be given to the corporation that comes in, but that its voluntary disclosure will be a major favorable consideration if there is a prosecution, a voluntary disclosure program will further enforcement goals.

Also, on the civil side or the administrative side, such a voluntary disclosure program, I think, would free resources considerably. I think that if you punish those who don't participate in the program, and you provide sufficient incentives to participate in the program, you will have less of an adversarial role on the administrative and civil side: People will come in, they will voluntarily disclose what they have discovered by way of wrongdoing, you will free the EPA's investigators and inspectors on the civil and administrative side to focus their efforts on efficient resolution, and you may be well on your way to a resolution in a less adversarial situation under such a program.

Senator REID. Mr. Mielke?

Mr. MIELKE. Mr. Chairman, from my perspective, the biggest problem local law enforcement has is your example of years ago, of a local detective that does not know what he's looking at. And there's just a crying need for training of local investigators.

As I mentioned, only 35 local investigators have been trained the past three years. We probably need 500 a year across this Nation to be trained. I'm fortunate. I have one of those 35 in one of my counties. And so, he is full time devoted to investigating environmental crimes. But that's not true across this Nation, in all the counties across this Nation. And so that's one of our biggest problems.

Our other biggest problem is that lack of communications among district attorneys and county attorneys as to what's happening out there. We've had some National conferences this past year, where we get together, and as Chairman of the Environmental Protection Committee of the NDAA, we just came from our meeting last Friday, in fact, where we were comparing notes of what we have been doing and how we've been doing it. There has just been a tremendous lack of communication, so we're always reinventing the wheel and taking the time to do it.

Mr. GALLAGHER. Mr. Chairman.

Senator REID. Yes, please.

Mr. GALLAGHER. Just to add one more point to the question of self-disclosure, that Mr. Starr has raised, EPA in its environmental auditing guidelines, in July of 1986, addressed the problem of self-disclosure in dealing with self-auditing programs, but it indicated that it would use its enforcement discretion to determine whether enforcement actions would be taken. Perhaps that is a good vehicle to be revisited to establish specific rules and guidelines, as Mr. Starr has recommended, for self-disclosure, and to set up procedures under these environmental auditing guidelines where companies would have an opportunity to come forward with self-disclosure under well-defined conditions.

Senator REID. Mr. Starr, something you said is disturbing. That is, the agents want to work with regions, but the regions, you say, aren't cooperating. Would you elaborate on that a little bit?

Mr. STARR. I'd be glad to. And let me recharacterize that.

Senator REID. This isn't the first time we've heard this.

Mr. STARR. Well, if it's critical, then I'm glad it's coming from other sources, too.

And let me slightly rephrase it. The language of a criminal investigator is different from that of the lawyer for EPA or the technical person for EPA. The attitude is not necessarily good, bad, or indifferent, right or wrong. I'm not placing a value on it. But it is difficult to transform an investigator, and EPA has been able to hire some extremely talented and experienced criminal investigators from DEA, ATF, IRS, FBI, major metropolitan police forces, with an incredibie sense of professionalism into an EPA technical person. Part of their professional training is not to function in the fishbowl that EPA proudly claims to be. It is difficult to take an investigator and say, we're going to have a weekly meeting where you're going to share with me all the work that your investigators are doing out there. It is difficult to tell an investigator to do that. Though, I believe earnestly, that the investigators are trying to participate and have walked their portion of the line to cooperate when cases are open, and I tried to outline in my opening remarks that you never really know where a case is going to go until its at the end. A lot of time, therefore, has been invested by then.

But at least when the investigators open up a case, and during the pendency of that investigation, they are telling the people in the region what the case is about, who it involves, and they need to do that so that the agency, the left hand, is working with the right hand. I don't feel, though, that information is coming back. And let me say that that's in part the fault of language. I do not see leads being given to investigators from the regional enforcement programs. I do not see information or support being given in terms of bodies, help, technical help or other types of support. I don't know what the solution is, except I have never been a believer, in the history of this program, brief though it is, that integration of the criminal enforcement program into the EPA fabric, which sounds nice and is hard to argue against, is the direction that the criminal enforcement program needs to take. It is different, sir, than EPA's other programs.

It is more involved with DOJ, or DOJ gets involved earlier on than in any of its other programs. The decision to turn a case back or decline it, is not the investigator's alone. DOJ has to do that. And so it seems to me to have different qualities and characteristics, and without treating it as the poor stepchild, I think that there is a way to bring it into the fabric, and yet keep it different and understand its characteristics and understand that those characteristics are that it's just plain different.

Senator **REID**. Do either of you care to comment on that?

Mr. **GALLAGHER**. Yes. I'd certainly like to comment. I agree substantially with what Mr. Starr has said. In my tenure in administering the criminal investigation component of the program, we did not get a substantial number of productive leads from the regional offices.

That's due to a combination of a lot of things. I think it's mostly omission on the Region's part rather than commission. The agency says it wants to integrate the criminal program into the overall agency mission in the enforcement program, but what it tends to do is to concentrate on shoe-horning the criminal investigators and support staff into the existing system when the criminal enforcement process is substantially different from the civil and administrative enforcement process.

It is important, it seems to me, for the agency, again, on the highest level, to communicate to all of its people in the regional offices what the characteristics are of the criminal investigation process; what are the things not to say publicly during an investigation, rather than what are the things that are to be said. It's very, very hard for these regional people to deal with a situation where they not only cannot know, and by the way, also tell everybody in sight all of the activities and characteristics that are underway with respect to a criminal investigation. That sort of communication to the regions on the process needs to be done until they really understand it.

There's one other reason why good productive leads are not coming from regional offices, as they come from State and local areas, and that is the environmental legislation requires that the operation of the programs be delegated to the States. Consequently, that's where the productive information is. It's not in EPA's regional offices, generally speaking. I think it's important for EPA, again, to have some kind of a communication strategy with its regional people about the criminal enforcement process, and what that entails. And in addition to that, to recognize that most of these productive leads are going to come from States and local areas. The Agency ought to go to those States and local entities and say, these are the generic criminal enforcement priorities that we want to concentrate on during next fiscal year; repeat offenders, as the Deputy Administrator has said, for instance. Therefore, please be sure that information that comes forward to EPA or to EPA's criminal investigators, or to NEIC, from your State and local people reflect these kinds of incidents, in terms of your and our priorities for investigations.

I think that would go a long way toward the definition of criminal enforcement priorities and a commitment by the agency to educate their regional personnel about the criminal enforcement process.

Senator REID. Mr. Starr, you've said, and others have said that today, but specifically you said, there's a way to integrate the criminal program into EPA. You said that, right?

Mr. STARR. I said that there is a way to integrate it, but I do not think, to use Mr. Gallagher's term, shoe-horning it, cookie cutter is the word I use, is the way. There is a desire to view the agencies as all being equals, and all programs as being similar, and to think there's a way to cookie-cutter them and to organize them in that fashion.

I do not believe, though, that the criminal enforcement program should be treated the same just because it's, from a management point of view, more comfortable to treat it like EPA's other programs.

Senator REID. Mr. Mielke, Mr. Starr, Mr. Gallagher, we very much appreciate your testimony.

Mr. Mielke, I would just make one comment on a point you made on two separate occasions. That is, that we simply do not train enough people for the investigatory level that can do an adequate job to help the prosecutors around the country, Federal, State, local level, to prosecute environmental crimes. I think that that would be something that this committee should be concerned about and that we should make funds available for local people to be trained accordingly, and make sure there are adequate facilities to train them. This is something I'm going to direct the staff of this subcommittee to look into.

I know in other areas, for example, Federal Emergency Management Agency, we have a program out here at Emmetsburg where we bring scores of people on a monthly basis, hundreds and hundreds of people a year, to train them in emergency management programs. And it's been helpful. When the emergencies take place across the country, that's one example of where the Federal Government has set up programs to help people on a local level. And certainly your testimony here amplifies that in the area about which this committee has been engaged today.

Thank you all very much for your testimony.

Mr. **Starr**. Thank you, Senator.

Mr. **Gallagher**. Thank you.

Mr. **Mielke**. Thank you.

Senator **Reid**. The record will remain open for one week for Senators and other interested people to submit questions and/or statements. This subcommittee stands in recess.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Statements and responses to additional questions follow:]

STATEMENT OF
F. HENRY HABICHT
DEPUTY ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON TOXIC SUBSTANCES, ENVIRONMENTAL OVERSIGHT, RESEARCH AND DEVELOPMENT
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE

November 15, 1989

It is my pleasure to appear before you today to discuss the steps the Administrator and I intend to take to improve enforcement at the Agency. To begin with, I am pleased to report that the Agency's enforcement program is stronger today than it has been for many years. In FY1988, for example, the Agency initiated over 3085 administrative actions, more than 372 civil cases and obtained 50 criminal convictions. As a result of these efforts, the Agency obtained over $35 million in penalties and Superfund injunctive relief valued at more than $575 million. Further, I am pleased to report that State environmental enforcement has also improved significantly in the past several years. EPA's work with the States has yielded impressive results and our enforcement partnership with the States has never been better. In FY 1988, States issued 9,363 administrative actions and referred over 900 civil judicial cases. Indeed, we must now recognize that nearly three-fourths of all environmental enforcement in this nation is now being conducted by the States under delegated environmental programs.

We are proud of the successes of recent years in environmental enforcement. At the same time, we believe this performance can be improved by moving enforcement into a new phase; by integrating enforcement more completely into the management and strategic planning fabric of the Agency and ensuring that all federal, state and local resources are coordinated as effectively and efficiently as possible. In our view, an environmental program, whether it is command and control or market based, cannot be effective without strong and predictable enforcement. As the Administrator and I promised in our confirmation hearings, enforcement is among our highest priorities, and we are committed to improving our present record and to making enforcement one of the cornerstones of our Administration.

Before I embark on a description of the steps we intend to take to strengthen our existing program, let me share with you my views as to how enforcement fits into the Administrator's and my vision for the Agency. First, it is our belief that enforcement plays a vital role in not only achieving and maintaining compliance with the nation's environmental laws, but in also achieving real tangible environmental benefits and results. For example, when the Administrator and I discovered that air toxic releases at certain facilities exceeded potentially serious risk levels, the Administrator and I asked several of the company's CEOs to meet with us so that they could explain what steps they would be willing to voluntarily take to reduce their emissions to more acceptable levels. At the meeting, we made it clear that if voluntary reductions were not reducing risk to safe levels we would explore using EPA's emergency authorities under the Clean Air Act and other statutes, if necessary, to secure necessary reductions. We are now in the process of reviewing the voluntary plans we have received from each of the companies and will soon determine what further actions will be necessary.

Second, EPA's ability to address environmental risks like the toxic releases I have just mentioned, will require that EPA target at least part of its enforcement program toward addressing pollution on a geographic and sector basis. Where, for instance, a valuable ecosystem is being threatened by a variety of sources, enforcement should be one of the principal tools used to address the contamination. The opportunities for this type of enforcement in connection with many of the nation's rivers, wetland areas, and bays is readily apparent and I look forward to using enforcement in this context. For example, Ted Erickson, the Regional Administrator for Region III, and I have talked about putting together such an initiative for the Chesapeake Bay, which I know the Chesapeake Bay Foundation has been interested in pursuing for sometime.

In addition, the Administrator and I strongly believe that a truly prevention-oriented approach to health and ecological threats requires me to aggressively pursue cross-media initiatives, including cross-media enforcement initiatives. Specifically, in order to address many of our environmental problems we must begin to break down the often artificial categories of air, water, waste, and toxics which have led us too often in the past to compartmentalize environmental problems. We now know that the ultimate answer must be pollution prevention, wherever possible, and not simply moving contaminants from one media to another. As such, we are excited by the prospect of experimenting with cross-media enforcement aimed at the various economic sectors which produce significant amounts of pollution. It is our hope that this will encourage both pollution prevention, and a more holistic approach to environmental management.

Toward that end, we believe that federal facility enforcement offers us a prime opportunity for embarking on such an endeavor, although it should not be the sole sector evaluated in this way. In particular, many of you may know of both DOE's and DOD's commitment to begin cross-media environmental auditing. In addition, several bills pending before the Congress would mandate such efforts. In order to be prepared to respond to these audits, the Administrator and I see substantial merit in consolidating federal facility enforcement into a single office within the Agency's Office of Enforcement and Compliance Monitoring. Once our plans for a Federal facility program are crystallized we would be more than pleased to discuss them further with the Committee and your staff.

Third, it must be understood that our desire to use targeting as part of our enforcement program will require changes in the way the Agency currently conducts some of its business. To begin with, in order to do this effectively, the Agency will need to improve its data collection and analytical methods, so that we can track compliance trends and environmental results. In addition, targeting enforcement actions against the largest sources of pollution will require changes in the Agency's management systems, which at present place too much value on the number of cases without sufficient regard to their quality and strategic worth. This will, of course, take time and understanding on the part of the Congress, environmental groups, States and the public. In this connection, the Agency is about to commence a review of EPA's enforcement role and its measures of effectiveness, which will involve representatives of all interested parties, including Congressional staff. It is our hope that by working together we can develop a better understanding of EPA's enforcement role and new measures for evaluating its success. Eventually we hope that this will allow us to look beyond the numbers to larger and more environmentally important cases. EPA and the States cannot forget their responsibility in maintaining high compliance by pursuing only geographic and sector initiatives, but a truly effective enforcement program must have both. Your understanding and support in achieving this balance will be critical to our ultimate success.

Fourth, and in keeping with our desire to improve the strategic value of enforcement, we intend to continue improving the Agency's criminal program and to better integrate criminal enforcement into the Agency's overall enforcement strategy. There can be no question that criminal enforcement is our most potent compliance tool. Indeed, the success of that program to date has been historic, and a source of pride to all who have had some role in its development, including our colleagues at the State and local levels. I am particularly proud to have had some involvement with this program in its early days. But its growth and accomplishments are a tribute to the outstanding people at NEIC and within OECM who are responsible for its day to day management and they, along with the FBI and Justice Department, deserve tremendous credit.

As with anything else, however, this program can also be improved. In particular, I believe the time may now be right to evaluate the program's structure so that we can ensure that it has the prominence it deserves both within OECM and within the Agency. I am committed to taking the steps we need to take to ensure that criminal enforcement is integrated into the Agency's environmental programs in a manner consistent with the recognition that the professional and independent judgment of investigators and prosecutors is the hallmark of an effective and fair criminal program.

Finally, but by no means last, the Administrator and I firmly believe that, in order to effectuate our vision, we need a strong Office of Enforcement at Headquarters. Quite simply, it is our intention to look to the Assistant Administrator for Enforcement as the Agency's voice for enforcement across all programs and we are committed to giving OECM the tools it needs for ensuring the overall effectiveness of EPA's enforcement program. With that, let me turn to the specific steps we are considering to accomplish these goals and to "make good" on our confirmation promises.

In keeping with our goal of improving the quality and value of the enforcement program, we intend to give OECM a pivotal role in the Agency's strategic planning process. This year the Administrator and I embarked on a 4-year strategic planning program which is designed to ensure that, on both a Regional and national basis, our resources and efforts are focused on addressing the most important environmental problems and risks. In order to ensure that we are managing our enforcement effort for the greatest environmental benefit, the Administrator and I intend to ask OECM to take each program's strategic plan and devise a comprehensive enforcement strategy for the Agency. We intend for this plan to address inspections, administrative, civil, and criminal priorities, as well as other measures the Agency might undertake to improve compliance, such as broadened use of environmental auditing, pollution prevention initiatives, educational programs, more effective communications, and training. In this connection it is important to remember that our goal is compliance, and that enforcement actions alone may not be the only answer. The enforcement strategic plan will, of course, be the product of internal deliberations with our program managers and our regions and their States. We are confident that those plans will go a long way toward improving the environmental value of our enforcement program. Moreover, these plans, which will be used in setting performance measures and eventually in preparing budgets and distributing resources, should give OECM at last part of the authority it needs to be the Agency's enforcement voice.

Second, in order for OECM to be effective as the Agency's enforcement coordinator, it is important that the Assistant Administrator of Enforcement be given the supervisory tools he needs to monitor enforcement. In this regard, it is important to recognize that EPA's administrative and civil enforcement effort is conducted almost exclusively by the Regional offices. And the Regional Counsels, together with our Deputy Regional Administrators are the individuals charged with the front-line responsibility for carrying out the Agency's civil enforcement effort.

In order to emphasize the Regional Counsel's role as enforcers, the Administrator and I believe that the Assistant Administrator for OECM should rate the Regional Counsel based on his or her enforcement performance after close and full consultation with the General Counsel. In the past, Regional Counsel ratings were part of the General Counsel's function. This refinement will ensure that Agency management processes reflect the priority placed on enforcement, but I should clarify that it does not mean that Regional Counsels will now be working for OECM as opposed to the Region. While we all work for EPA, within the EPA management structure the Regional Counsels will continue to represent clients in the Regions and to develop and implement Regional priorities in support of EPA's overall mission. Nonetheless, with this new authority the Assistant Administrator of OECM should be able to ensure that our enforcement program is being carried out in compliance with our strategic plans. In addition, this proposal is not intended to undermine, in any way, the significant counseling functions of the Regional Counsels or the role of the General Counsel in ensuring that the legal positions taken in litigation are consistent and well-coordinated. As we prepare for this transition many details will need to be sorted out. I have, therefore, asked that an internal work group be established to iron out the details of this initiative.

It is also important to recognize that it is the Regional Administrators (RAs) and Deputy Regional Administrators (DRAs) and not the Regional Counsels who are responsible for ensuring that the Regional program offices properly identify violators and refer appropriate cases for enforcement. Under our proposal, the programs will continue to play this critical role and the renewed emphasis on the Office of Enforcement is not intended to change the Regional relationships which are now in place. In order to make sure that the Regional programs meet their enforcement commitments, including the commitments set forth in the strategic plans, the Administrator and I believe that the Assistant Administrator for Enforcement needs to have a voice in each DRA's rating. The Regional Administrator will have final rating authority, over the DRAs. In turn, the Administrator and I intend to hold our RA's accountable for enforcement, as well. In our view, by making all of the key players fully accountable and by ensuring that credit and resources support enforcement commitments can we be sure that successful enforcement will become institutionalized.

While those steps should go a long way toward directing and strengthening our enforcement effort, the Administrator and I also believe that the Office of Enforcement and Compliance

Monitoring will need to refocus much of its effort. OECM's role in strategic planning will be one of OECM's new responsibilities, but OECM will be looked to for much more. In particular, OECM needs to refocus its efforts to assisting the Regions and States in carrying out their enforcement responsibilities. First, the Administrator and I expect to see more of OECM's attorneys in the field assisting the Regions in developing and prosecuting cases, particularly the bigger cases and multicase or multi-media initiatives that require a large resource commitment. EPA's recent asbestos initiative, EPCRA initiative (Emergency Planning and Community Right-to-Know) and pretreatment initiative demonstrate the valuable role OECM can play in focusing enforcement on critical environmental issues. It is our hope that with these special litigation teams, OECM will not only be able to help the Regions, but that the experience will give OECM lawyers increased hands-on experience. Hands-on experience is, of course, critical in setting and developing enforcement policy.

Second, the Administrator and I are committed to improving the training opportunities for our enforcers. We are consolidating many of our existing training programs and hope to establish within OECM a National Environmental Enforcement Training Institute which will provide comprehensive training for EPA investigators, inspectors, prosecutors, and technical staff. And the Administrator and I are most appreciative of the Committee's interest in this Institute.

Third, as I indicated earlier, our ability to better target our enforcement efforts will hinge in great part on our ability to collect, organize and analyze meaningful enforcement and compliance-related data. Accordingly, I have already charged OECM with developing proposals for making better use of our various media-specific compliance tracking systems and the EPCRA data so that we can evaluate compliance trends and significant pollutant release information; so that we can better target our inspection and enforcement actions both within programs as well as on a multi-media basis. This information will, of course, be of critical importance in the on-going strategic planning process. Further, the Administrator and I are interested in working with other agencies, including the Securities and Exchange Commission, to make sure that any relevant information they collect is also available to us in our targeting effort.

Fourth, we expect OECM to play a greater role in the Agency's rulemaking process. The Agency's rules and regulations are extremely complex and it is sometimes unclear if they are sufficiently enforceable from a practical perspective. In particular, OECM needs to make sure that the regulations themselves are sufficiently clear and workable so that they can be fairly and fully enforced.

Fifth, we expect OECM to continue its settlement review functions, in order to assure national consistency. Nonetheless, we expect OECM to explore with the program offices, Regions, and the Justice Department ways of expediting reviews and elevating conflicts should they arise. Similarly, we would expect OECM to keep the Regions up to date on recent settlements, decisions, and policy pronouncements affecting enforcement, so that an appropriate level of consistency can be maintained. I also believe that initiation of the Training Institute will help maintain consistency nation-wide. Further, I expect that when we receive helpful suggestions from the Inspector General on enforcement matters, particularly those relating to settlements, that we take action to address those recommendations. It is my understanding that OECM is now preparing action plans to implement the many fine recommendations we have received from the Inspector General, and I fully expect and hope that the Inspector General will continue to keep us informed of the problems he finds and of the changes we can make to improve the program.

Sixth, let me say a few words about the Administrator and my vision for the Agency's criminal program. As I stated at the outset, the Administrator and I are firmly committed to the Agency's criminal program and intend to give it the full support it deserves. We have not, however, reached any final conclusions regarding its structure. The Agency conducted an internal review of the program and we have been presented with several organizational options. We also expect a GAO study in the next month or so which will address many of these same issues. As a consequence, we do not intend to make any final decisions until we have the benefit of all interested parties' views. We expect soon to hear the results of the new Assistant Administrator's assessment of this matter and we hope that with the benefit of GAO findings and other views, we can make some decisions in the near future.

Nonetheless, I can assure you, that regardless of the ultimate decisions on organization, we intend to begin work immediately on better integrating criminal enforcement into our overall enforcement program. We expect OECM's criminal attorneys and investigators to play a critical role in the strategic planning effort and to make sure that criminal enforcement is looked at in each program. We also expect OECM's investigators and attorneys to work with the Regions to begin targeting repeat civil offenders and to review enforcement referrals for their "criminal" potential. Finally, the Administrator and I hope to meet soon with the Director of the FBI and the Attorney General to discuss how we can better work together in targeting the FBI's large environmental effort so that we can achieve the maximum results.

In sum, the Administrator and I have every confidence that the proposals I have outlined above will not only improve our enforcement program but will lead to improved environmental results. Obviously we and the States cannot pursue everyone, thus the program I have outlined is aimed at achieving the most value possible from what we are able to do. Our goals are straight-forward: (1) reduce risk; (2) prevent pollution; (3) preserve the integrity of the regulatory structure; and, (4) deter violations. By using these criteria we hope to not only improve upon our record but make EPA's enforcement program a model for others to follow. You can expect that over the course of our administration the Administrator and I will use the opportunities we have to make enforcement part of our personal agendas and to look for opportunities to tell the public, the Congress, and the regulated community of our program and its accomplishments. Indeed, publicizing our efforts and those of the States, will be critical in maintaining and building the credibility of our program. Clearly, taking EPA's enforcement program to the next level will not be easy, but you have my, and the Administrator's personal commitment to it and with your support and that of the States and public I am confident we will succeed.

TESTIMONY OF JOHN C. MARTIN
INSPECTOR GENERAL
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE SUBCOMMITTEE ON TOXIC SUBSTANCES,
ENVIRONMENTAL OVERSIGHT, RESEARCH AND DEVELOPMENT
OF THE
SENATE COMMITTEE ON ENVIRONMENT AND
PUBLIC WORKS

NOVEMBER 15, 1989

GOOD MORNING, MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. I AM PLEASED TO HAVE THIS OPPORTUNITY TO DISCUSS OUR RECENT AUDIT WORK RELATING TO EPA ENFORCEMENT OF ENVIRONMENTAL LAWS AND REGULATIONS. THESE AUDITS FOCUSED ON AGENCY ACTIVITIES BETWEEN FISCAL YEARS 1984-1988.

EPA HAS REPORTED THAT IT HAS INCREASED THE NUMBER OF ENFORCEMENT ACTIONS, AND THAT PENALTY COLLECTIONS ARE RUNNING AT A RECORD LEVEL. HOWEVER, ARE THESE FACTS IN AND OF THEMSELVES SUFFICIENT TO CONCLUDE THAT EPA HAS AN EFFECTIVE ENFORCEMENT PROGRAM?

OUR REVIEWS OF ENFORCEMENT INDICATE THAT OTHER FACTORS MUST ALSO BE CONSIDERED. NAMELY, WHETHER THE PENALTIES LEVIED ARE FAIR AND SUFFICIENT TO DETER VIOLATORS, AND WHETHER ENFORCEMENT WAS SUCCESSFUL IN GETTING NECESSARY CORRECTIVE ACTIONS TAKEN SO THAT VIOLATORS RETURN TO COMPLIANCE AND OPERATE IN ACCORDANCE WITH POLLUTION LAWS.

OVER THE YEARS, EPA HAS DEVELOPED PROCEDURES NECESSARY TO CONDUCT AN EFFECTIVE ENFORCEMENT PROGRAM. OUR AUDITS HAVE SHOWN, HOWEVER, THAT THE AGENCY IS NOT FOLLOWING THESE PROCEDURES. SPECIFICALLY, MR. CHAIRMAN, IN 1984 EPA PREPARED A UNIFORM CIVIL PENALTY POLICY. EACH MEDIA PROGRAM OFFICE SUCH AS RCRA, WATER, AND AIR PREPARED ITS OWN CIVIL PENALTY POLICY USING THE AGENCY UNIFORM POLICY AS A GUIDE.

THESE PENALTY POLICIES ESTABLISHED A SINGLE SET OF GOALS FOR PENALTY ASSESSMENT IN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT ACTIONS. THESE GOALS ARE:

- DETERRENCE;
- FAIR AND EQUITABLE TREATMENT OF THE REGULATED COMMUNITY; AND
- SWIFT RESOLUTION OF ENVIRONMENTAL PROBLEMS.

THE MOST IMPORTANT MECHANISMS FOR ACHIEVING CONSISTENCY ARE THE SYSTEMATIC METHODS FOR CALCULATING THE ECONOMIC BENEFIT AND THE GRAVITY COMPONENT OF THE PENALTY. ECONOMIC BENEFIT IS THE FINANCIAL BENEFIT THE VIOLATOR RECEIVED FROM DELAYED OR AVOIDED COSTS; AND THE GRAVITY COMPONENT REFLECTS THE ACTUAL OR POTENTIAL HARM TO THE ENVIRONMENT, IMPORTANCE OF THE REGULATORY VIOLATION, AND THE SIZE OF THE VIOLATOR. IT IS ESSENTIAL THAT PENALTIES BE CALCULATED AND EACH CASE FILE CONTAIN A COMPLETE DESCRIPTION OF HOW EACH PENALTY WAS DEVELOPED. THEN, AGENCY MANAGERS CAN EXERCISE THEIR SUPERVISORY AUTHORITY TO ENSURE VIOLATORS ARE TREATED IN A CONSISTENT AND FAIR MANNER.

INADEQUATE CALCULATION OF PENALTIES AND INSUFFICIENT DOCUMENTATION TO SUPPORT PENALTY REDUCTIONS CREATES AN OPPORTUNITY FOR FRAUD OR ABUSE IN EPA'S PENALTY PROGRAM. ALL TRANSACTIONS AND EVENTS IN THE ENFORCEMENT PROCESS MUST BE CLEARLY DOCUMENTED AND THE DOCUMENTATION AVAILABLE AND EASILY ACCESSIBLE FOR EXAMINATION. IF THEY ARE NOT, THE AGENCY CANNOT BE SURE ITS ENFORCEMENT ACTIONS OBTAIN MAXIMUM DETERRENCE OR

ENSURE FAIR AND EQUITABLE TREATMENT OF THE REGULATED COMMUNITY.

CAPPING REPORT

IN SEPTEMBER OF THIS YEAR, MY OFFICE ISSUED A "CAPPING" REPORT WHICH SUMMARIZES PREVIOUSLY ISSUED AUDIT REPORTS ON THE COMPUTATION, NEGOTIATION, MITIGATION, AND ASSESSMENT OF PENALTIES UNDER THREE EPA PROGRAMS; AIR, WATER, AND RCRA. THE REPORT WAS ISSUED TO APPRISE SENIOR EPA MANAGEMENT OF THE RECURRING PROBLEMS IDENTIFIED IN OUR INDIVIDUAL AUDIT REPORTS.

OUR CAPPING REPORT SHOWS THAT APPROPRIATE PENALTIES WERE INADEQUATELY CALCULATED OR NOT CALCULATED AT ALL FOR MAJOR VIOLATIONS. ALSO, CALCULATED PENALTIES WERE REDUCED DURING NEGOTIATIONS. IN SOME CASES REDUCTIONS WERE IN EXCESS OF 90 PERCENT AND AMOUNTED TO MILLIONS OF DOLLARS, WITH LITTLE OR NO DOCUMENTATION TO SUPPORT THEM. IN MANY CASES, THE FINANCIAL BENEFITS THE VIOLATORS RECEIVED FROM NOT COMPLYING WITH EPA REGULATIONS WERE NOT RECOVERED THROUGH PENALTY ASSESSMENTS, MAKING IT ECONOMICALLY ADVANTAGEOUS FOR VIOLATORS TO BE IN VIOLATION OF THE LAW.

GENERALLY, THIS CONDITION EXISTED BECAUSE AGENCY PERSONNEL DID NOT FULLY COMPLY WITH THE PENALTY POLICIES IN PLACE. TO ILLUSTRATE THIS, LET ME GIVE YOU A FEW EXAMPLES:

- FOR A CITY THAT WAS ONE OF REGION 4'S WORST VIOLATORS OF THE CLEAN WATER ACT, EPA COMPUTED AN INITIAL PENALTY OF $3.6 MILLION. HOWEVER, CITING LITIGATION CONSIDERATIONS OF $2.9 MILLION AND ABILITY TO PAY CONSIDERATIONS OF $700,000, THE REGION COMPUTED A SETTLEMENT AMOUNT OF $36,844. THERE

WAS NO SUPPORT TO SHOW THE METHOD USED TO ARRIVE AT THE LITIGATION CONSIDERATION FIGURE. IT SEEMED TO BE AN ARBITRARILY ARRIVED AT FIGURE DESIGNED TO REDUCE THE AMOUNT RECOMMENDED FOR THE PENALTY. THE CASE REMAINED UNRESOLVED AT THE CLOSE OF OUR AUDIT WORK AND THE FACILITY REMAINED IN NON-COMPLIANCE.

IN REGION 1, THE NEGOTIATORS REDUCED THE PROPOSED PENALTIES FOR A RCRA FACILITY FROM $2.5 MILLION DOWN TO $90,000 OR A REDUCTION OF 96 PERCENT. THE ORIGINALLY PROPOSED PENALTIES INCLUDED $2.5 MILLION ($25,000 PER DAY FOR 97 DAYS) FOR OPERATING A HAZARDOUS WASTE SURFACE IMPOUNDMENT WITHOUT A PERMIT OR INTERIM STATUS, AND $64,000 FOR SEVERAL OTHER COUNTS INCLUDING INADEQUATE LIABILITY COVERAGE AND ILLEGAL INTERNATIONAL SHIPMENTS OF HAZARDOUS WASTE.

REGIONAL NEGOTIATORS OFFERED TO REDUCE THE PENALTY FROM $25,000 PER DAY TO $9,500 PER DAY, (FOR A TOTAL PENALTY OF $931,000) BASED ON A REASSESSMENT OF THE POTENTIAL HARM. NO DOCUMENTARY EVIDENCE TO SUPPORT THIS REASSESSMENT COULD BE FOUND IN THE REGION'S RECORDS.

AS NEGOTIATIONS PROCEEDED, THE REGION SET A TARGET PENALTY SETTLEMENT OF $200,000. THE BASIS FOR THE SETTLEMENT TARGET WAS NOT CLEARLY DOCUMENTED IN THE REGION'S RECORDS. THE REGION SETTLED ON A FINAL ASSESSED PENALTY OF $90,000, TO BE PAID IN INSTALLMENTS OVER THREE YEARS.

IN ADDITION, MR. CHAIRMAN, WE FOUND THAT THE AGENCY DOES NOT HAVE THE COMPLETE PENALTY INFORMATION NEEDED TO REVIEW ISSUES AND CONCERNS ASSOCIATED WITH THE NEGOTIATION AND ASSESSMENT OF PENALTIES. FOR EXAMPLE, EPA REPORTS DO NOT CAPTURE THE PENALTIES COMPUTED OR ASSESSED, NOR THE MILLIONS OF DOLLARS MITIGATED BY EPA AND DEPARTMENT OF JUSTICE NEGOTIATORS. AS A RESULT, SENIOR MANAGEMENT OFFICIALS ARE NOT IN A POSITION TO FULLY IDENTIFY THOSE AREAS NEEDING IMPROVEMENT.

IN OUR CAPPING REPORT, WE RECOMMENDED THAT SENIOR EPA MANAGERS: (1) REEMPHASIZE THE NEED FOR AGENCY PERSONNEL TO FULLY ADHERE TO PROGRAM PENALTY POLICIES; (2) CONDUCT EXPANDED HEADQUARTER'S REVIEWS OF REGIONAL ENFORCEMENT ACTIONS TO INCLUDE LOOKING AT THE ADEQUACY OF PENALTY CALCULATIONS, MITIGATIONS AND DOCUMENTATION; AND (3) INCORPORATE INTO THE AGENCY'S MANAGEMENT INFORMATION SYSTEM DATA TO SHOW COMPUTED PENALTIES, REDUCTIONS BY AGENCY STAFF AND THE DEPARTMENT OF JUSTICE STAFF, AND THE FINAL ASSESSED AMOUNTS. THE AGENCY SUBSTANTIALLY AGREED WITH THESE RECOMMENDATIONS.

CHESAPEAKE BAY REPORT

IN ADDITION, MR. CHAIRMAN, IN SEPTEMBER, MY OFFICE ISSUED A REPORT ON "MANAGEMENT OF THE CHESAPEAKE BAY PROGRAM POINT SOURCE POLLUTION PROGRAM". THE CHESAPEAKE BAY REPORT ALSO SHOWS A DEFICIENCY IN ENFORCING EPA'S LAWS. SPECIFICALLY, WE FOUND THAT IN THE PAST EPA'S REGION 3 DID NOT EFFECTIVELY PERFORM ITS RESPONSIBILITIES TO ENFORCE AGAINST FACILITIES WHO VIOLATED THEIR WASTEWATER DISCHARGE PERMITS. AS A RESULT, POLLUTERS WERE

ALLOWED TO DISCHARGE MILLIONS OF GALLONS OF INADEQUATELY TREATED WASTEWATER INTO THE CHESAPEAKE BAY FOR MANY YEARS.

FOR EXAMPLE, WE IDENTIFIED A WOOD PRESERVING OPERATION THAT PRODUCED RAILROAD TIES, FOUNDATION PILINGS AND LANDSCAPE LUMBER. ALTHOUGH 5 ENFORCEMENT ORDERS WERE ISSUED FOR VIOLATIONS OF DISCHARGE PERMITS, NOT ONE PENALTY WAS ASSESSED IN 13 YEARS OF OPERATION.

THE VIOLATIONS THAT THIS FACILITY PRODUCED CAUSED A NUMBER OF ENVIRONMENTAL PROBLEMS, SUCH AS SURFACE AND GROUND WATER CONTAMINATION. AS A RESULT, IN JUNE OF 1986 THE SITE WAS LISTED ON THE SUPERFUND NATIONAL PRIORITIES LIST AND THE COST OF THE CLEANUP WAS ESTIMATED AT $23 MILLION. NOT UNTIL JULY OF 1988 WAS THE DISCHARGE PERMIT FOR THIS FACILITY FINALLY REVOKED. MORE AGGRESSIVE ENFORCEMENT ACTION MIGHT HAVE FORCED THE INDUSTRY TO ACT MORE RESPONSIBLY AND MIGHT HAVE REDUCED OR EVEN ELIMINATED THE NEED FOR A SUPERFUND CLEANUP.

IN ANOTHER INSTANCE, WE FOUND THAT A MUNICIPALITY PAID ONLY $7,800 FOR NUMEROUS NPDES PERMIT VIOLATIONS THAT OCCURRED SINCE 1986. THIS AMOUNT INCLUDED $3,200 FOR TWO INCIDENTS IN WHICH MORE THAN 1600 FISH WERE KILLED BECAUSE OF VIOLATIONS. BETWEEN FEBRUARY AND DECEMBER 1987, THIS PLANT ALSO VIOLATED THE BIOCHEMICAL OXYGEN DEMAND LIMIT IN THE CONSENT DECREE THAT WAS ISSUED. FOR THESE VIOLATIONS, THE MUNICIPAL AUTHORITY WAS FINED $1,000. WE ESTIMATE THE PENALTY COULD HAVE BEEN AT LEAST $390,000 FOR THESE VIOLATIONS.

RCRA ENFORCEMENT ORDERS

EARLIER THIS YEAR, OUR OFFICE ISSUED A REPORT SHOWING THAT EPA OVERSIGHT WAS NOT ADEQUATE TO ENSURE THAT RCRA VIOLATORS PROPERLY COMPLIED WITH ENFORCEMENT ORDERS. IN THE RCRA PROGRAM, EPA'S TOP MANAGEMENT REPORT COUNTED THE NUMBER OF ENFORCEMENT ACTIONS TAKEN AGAINST VIOLATORS, BUT DID NOT CONSIDER WHETHER THESE ENFORCEMENT ACTIONS WERE SUCCESSFUL IN BRING VIOLATORS BACK INTO COMPLIANCE.

FROM A JUDGMENTAL SAMPLE OF ENFORCEMENT ORDERS IN THE RCRA PROGRAM, WE CONCLUDED THAT ABOUT 80 PERCENT OF THE FACILITIES SAMPLED WERE EITHER NOT RESPONDING TIMELY AND ADEQUATELY, OR THERE WAS NOT CLEARLY DOCUMENTED EVIDENCE OF THEIR COMPLIANCE WITH THE TERMS INCLUDED IN THE ENFORCEMENT ORDERS. WITHOUT TIMELY AND ADEQUATE COMPLIANCE, THE POTENTIAL EXISTS FOR ENVIRONMENTAL DEGRADATION WHILE VIOLATORS GAIN ECONOMIC BENEFITS BY AVOIDING THE COSTS OF COMPLIANCE.

MAJOR FACTORS CONTRIBUTING TO LACK OF ADEQUATE EPA OVERSIGHT INCLUDED:

1. ENFORCEMENT ORDERS FREQUENTLY LACKED PENALTIES FOR NONCOMPLIANCE.
2. PROGRAM OFFICIALS FAILED TO CONDUCT TIMELY FOLLOWUP SITE INSPECTIONS TO ASSURE COMPLIANCE.
3. ENFORCEMENT ORDERS TERMS AND CONDITIONS WERE OFTEN WEAK.
4. UNAUTHORIZED OR UNDOCUMENTED MODIFICATIONS WERE MADE BY REGIONAL STAFF.

5. REGIONAL OPERATING POLICIES, PROCEDURES AND TRACKING SYSTEMS WERE INADEQUATE.

TO IMPROVE THE SITUATION, WE RECOMMENDED THAT EPA HEADQUARTERS:

1. PUBLISH GUIDANCE TO SET REGIONAL STANDARDS FOR MONITORING ENFORCEMENT ORDER PROVISIONS AND MAINTAINING POST-ORDER COMPLIANCE FILES.
2. DESIGNATE AN EFFECTIVE AUTOMATED REGIONAL ENFORCEMENT ORDER TRACKING SYSTEM THAT CAN BE UNIFORMLY IMPLEMENTED BY THE REGION TO IMPROVE COMPLIANCE MONITORING ACTIVITIES.

CONCLUSION

THE MANAGEMENT TEAM AT EPA HAS ACKNOWLEDGED THE PROBLEMS I HAVE DISCUSSED WITH YOU THIS MORNING AND HAS INDICATED ITS INTENTION TO TAKE APPROPRIATE CORRECTIVE ACTION. THE PROPOSED RESTRUCTURING OF THE AGENCY'S ENFORCEMENT PROGRAM IS NOT AT THIS POINT DEFINITIVE ENOUGH FOR US TO EVALUATE WHETHER IT WILL REMEDY THE PROBLEMS WE HAVE DISCUSSED HERE TODAY. WE WILL CONTINUE TO PERFORM AUDITS OF ENFORCEMENT ACTIVITIES AND OTHER EPA PROGRAMS AND EXPRESS OUR OPINION AS TO THE ADEQUACY OF CORRECTIVE ACTIONS TAKEN. THIS CONCLUDES MY STATEMENT. I WILL BE PLEASED TO ANSWER ANY QUESTIONS THAT YOU HAVE.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 16 1990 [illegible]

THE INSPECTOR GENERAL

Honorable Joseph I. Lieberman
United States Senate
Washington, DC 20510

Dear Senator Lieberman:

This is in response to your request concerning several questions regarding my testimony on November 15, 1989, before the Subcommittee on Toxic Substances, Environmental Oversight, Research and Development of the Senate Committee on Environment and Public Works.

On an overall basis your questions seem to focus primarily on the adequacy of the Agency's enforcement actions. In response, let me say that the Office of Inspector General is heartened by the positive response and corrective actions proposed by the Agency. We believe that if the Agency effectively implements its planned corrective action, its enforcement of EPA laws will be greatly improved.

The enclosure answers each of your questions. Should you or your staff have any further questions, please have your staff contact Kenneth Konz, Acting Assistant Inspector General for Audit, on 382-4106.

Sincerely,

John C Martin

John C. Martin

Enclosure

Question 1. ENFORCEMENT STRUCTURE

You have indicated that the restructuring proposed by the Agency is not yet definitive enough to evaluate whether it will remedy the problems discussed by you.

What specific areas do you recommend the Agency examine in the area of structure of the enforcement process to meet some of the concerns you have outlined?

Answer. A Headquarters supervisory structure over regional enforcement personnel is needed to provide incentive for enforcement priorities and direction. This would help ensure better Headquarters oversight of the regional enforcement processes. The Agency also needs to make analyses of the different regional philosophies regarding emphasis on (1) concentrating enforcement actions on large violators opposed to small violators and vice versa, (2) returning violators to compliance rather than imposing penalties, and (3) imposing many small penalties rather than few large penalties.

Additional guidance and training directed at regional staff are necessary to be able to monitor consent agreements/final orders and compliance under the various EPA laws. Tracking and quarterly status reports on violators' compliance efforts after enforcement actions are also needed.

Question 2. MEASUREMENTS OF SUCCESS

We are all struggling with the appropriate way to measure enforcement success. Your reports have concluded that the Agency may not be reporting the right statistics or data to judge environmental progress. For example, you are concerned that once the Agency issues an administrative order or signs a consent decree, it considers the violator to be in compliance with the law, regardless of whether the agreement is obeyed.

How would the Agency judge the success of its programs?

Answer. The success of EPA's programs relate directly to (a) the standards set for the regulated community, (b) the number in compliance with the applicable standards, and (c) the enforcement actions against noncompliers. It is, of course, important to know how many of the regulated community are in compliance with the established standards. Of equal importance is the number not in compliance. The accuracy and completeness of the information is paramount to judge the Agency's success in returning violators to full compliance.

Regarding permit compliance under the Clean Water Act, in our September 15, 1988, report NPDES Compliance Monitoring Information, we concluded that noncompliance data being reported by states and regions in their Quarterly Noncompliance Reports (QNCRs) were not always complete or correct. In our report we stated that EPA regions and states must take responsibility for the accuracy of the noncompliance data being reported. We also stated that Headquarters must provide the necessary oversight to ensure the completeness of the information in the system.

In response to our report, the Agency agreed that the regions and states must take responsibility for the accuracy of the data, and that increased Headquarters oversight should be conducted. They also stated that a permanent program to review QNCRs is being established and a quality assurance guide is being developed for regions to use to conduct quality control on EPA and state generated QNCRs. If the Agency implements these programs, the quality of the noncompliance data should improve.

On our audit of the Chesapeake Bay we found the Agency primarily uses the number of facilities on the Exceptions List and the Significant Noncompliance Rate (SNC) to measure their effectiveness. We do not believe these statistics are a valid measure of enforcement. We examined 11 of the 88 major dischargers reported as out of compliance. These facilities violated their NPDES permit for many years. Only four of these eleven were shown on the Exceptions List for a few months.

While most of the facilities included in our review were also shown in SNC, violators were often given interim limits that were less stringent than their original permit. These interim limits often masked the violation. This allowed violators to be taken off the Exceptions List or out of SNC and considered as "resolved pending." However, the facility was discharging the same amount of inadequately treated wastewater.

A more meaningful measure of the Agency's enforcement would be to measure how quickly the violating facility achieved compliance with their final NPDES permit limits rather than the interim limits contained in enforcement orders. Violating facilities should be shown on the Exceptions List or in SNC until compliance is achieved with the final limits. In that way, the number of the facilities shown on the Exceptions List and in SNC would be a valid measure of enforcement.

Most of the Agency regulations and laws have been in place for several years and many of the regulated community are in compliance with the laws. For those in significant noncompliance the Agency needs to specifically track each and report quarterly on their compliance status. In other words stay on top of the violators using all of the laws passed by the Congress to bring about compliance. At periodic times the Agency should issue a report highlighting its success in bringing violators into compliance, and make the report available to the Congress and the public. This would be an indicator of the success of the various programs.

Question 3. HEADQUARTERS OVERSIGHT

> Your reports conclude that the regional offices of EPA are not adequately overseeing the enforcement programs of the states and that EPA Headquarters is not properly overseeing the work of the regions, particularly with respect to penalty calculations.
>
> What specific steps do you believe should be taken to insure greater oversight by EPA Headquarters?

Answer. EPA Headquarters should institute a more aggressive oversight program of regional activities. Specifically, during their periodic reviews, Headquarters should analyze a sample of enforcement cases to ensure regional compliance with EPA's penalty policies. Also, an evaluation of regional oversight of state activities should be included.

In replying to our draft report on the Computation, Negotiation, Mitigation, and Assessment of Penalties under EPA Programs, EPA's Acting Assistant Administrator for the Office of Enforcement and Compliance Monitoring (OECM) stated that his office will participate in expanded program oversight reviews conducted periodically by each program office. (OECM refers to these reviews as environmental "audits." These "audits" should not be confused with the independent audits conducted by the Office of Inspector General. Rather they are compliance reviews to determine whether EPA's regions are complying with the Agency's penalty policies.)

OECM is required, as part of responding to our audit report, to describe its planned participation in enforcement reviews. Upon receipt, we will evaluate OECM's response to determine whether it is adequate to ensure objective oversight. We will perform necessary followup reviews to determine whether effective oversight reviews are in fact performed.

Additionally, OECM has previously put in place procedures which will permit it to perform oversight on a case-by-case basis. For example, OECM has promulgated a "Model Litigation Report Outline" to be used in each enforcement case. The Outline's purpose is to (1) create a common understanding among Agency personnel and Department of Justice attorneys as to what the litigation report needs to cover, and (2) to make the report's form consistent. By reviewing cases prepared in accordance with these requirements, OECM will be able to review accordance with these requirements, OECM will be able to review enforcement on a case-by-case basis. We plan to do more work in this area to see if the litigation report outline process is an effective tool for assuring the proper assessment of penalties.

Question 4. PENALTY CALCULATIONS

Your reports recommend that EPA's reporting system should reflect both the original penalty calculated by EPA prior to negotiations and then the final amount received after negotiations.

Is it your recommendation that a comparison of these two numbers be used to measure enforcement success or failure?

Answer. No. But we believe it can be used as a factor which would serve as an indicator on whether the laws and EPA policies regarding penalties were followed. By modification of existing program data bases and input of accurate and complete information to the data bases, Agency management would be in a better position to associate data on compliance and enforcement activities to specific program offices and regions. Thus, not only a comparison can be made between regions by program area, but media program comparisons can be made within regions.

EPA implemented the various laws by establishing penalty policies. The penalty policies provided guidance on the computation and negotiation of penalties. By having the two numbers (computed versus negotiated) readily available, senior EPA management can be in a better position to select and evaluate on a case-by-case basis whether its penalty policies are followed. The potential, after the fact, review of cases should encourage quality enforcement processing, including detailed documentation for applicable decisions; a significant weakness we found during our audits.

We found in many of our reviews that economic benefits were not even calculated. Further, gravity based penalties were not always reflective of the seriousness of the violations, duration of noncompliance, nor the number of violations found. We believe that all these factors need to be considered in computing the initial proposed penalty assessment.

Once this is done, the Agency can and should consider other factors in deciding whether to mitigate or reduce the penalty assessment. The Agency then should give appropriate consideration to financial hardship, good faith efforts, etc., in determining the final penalty. However, such consideration should be done in accordance with the provisions of the established Agency penalty policies and should be appropriately documented so that Agency management and the public can be assured that such adjustments were fair and reasonable.

Based on replies to our reports, we believe the Agency has recognized the need for improving their penalty assessment process and has the capability of solving the reported problems. You can be sure that we intend to continue performing reviews in this area and will update our reports as to the adequacy of corrective action. I would like to point out that the Administrator, in his report dated December 22, 1989, to the President, regarding whether EPA's internal control and financial systems meet the objectives of the Federal Managers' Financial Integrity Act listed improvements in enforcement as a top priority for the Agency during 1990. Specifically, the Administrator plans to address:

1. Enforcement Tracking: EPA systems do not always track corrective actions required of violators, with regard to Consent Decrees, until full compliance is achieved.

2. Enforcement Data: EPA has been seriously hampered in its ability to develop enforcement actions, set enforcement priorities and target enforcement, respond to crises, and conduct program oversight because of the inability to associate data on compliance and enforcement activities from the various program office data bases. EPA needs improved systems to help in the identification of violators of environmental laws and regulations.

3. Enforcement Penalties: Controls need to be put in place to ensure that penalties imposed against violators are calculated in accordance with EPA policy and that adequate justifications are documented to explain the basis for any reductions.

Question 5. CHESAPEAKE BAY

Your report on the Chesapeake Bay is critical of EPA's oversight of the states' enforcement activities. Moreover, you conclude that even when pollution was serious or longstanding, penalties were not assessed or assessed only in small amounts.

Has EPA taken effective actions in response to this report?

What lessons can we learn from your Chesapeake Bay study about how to structure enforcement programs at other estuaries such as Long Island Sound?

Answer. While the Agency's response indicates they agree with our findings and recommendations, the actions needed to rectify the conditions disclosed in our report have not yet been implemented. However, they indicated the necessary actions will be implemented in the future. For example, their response stated:

> We will monitor compliance with negotiated schedules established in consent agreements issued by the states. If we find that compliance with schedules is not enforced, for instance, if extensions are granted without valid reasons, or if enforcement actions are not escalated when schedules are not met, Region III will work with the states, Regional Counsel and Headquarters to undertake specific actions to secure compliance, using penalties as appropriate.
>
> Region 3 will review state enforcement actions and compare them to EPA guidance to determine if an appropriate remedy, including the adequacy of the penalty, was achieved. Where either the remedy or the penalty is considered insufficient to realize EPA's purposes, EPA will take the necessary actions, including overfiling, to cure the deficiency.
>
> We will continue to pursue acquisition of a Memorandum of Agreement and written descriptions of the enforcement procedures used in each state.

As you can see the Agency's response indicates numerous actions that will take place in the future. While on the surface their response appears adequate, we can not say with certainty the Agency will implement these actions with the intensity needed to actually strengthen enforcement. However, as part of my followup review of issued reports I will evaluate the actions taken by the Agency to determine if their efforts are effective.

Our study of the Chesapeake Bay provided several lessons which could be used to structure enforcement programs of our estuaries. There is a need for detailed oversight of the states by EPA. The Agency needs to ensure that the states take effective enforcement action against all violators especially the municipalities. Action needs to be taken to ensure that the states do not use enforcement actions such as consent orders to mask the violations.

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"Environmental Defense - Environmental Education - Land Conservation"

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"ENFORCEMENT OF ENVIRONMENTAL LAWS"

Testimony of

Ann Powers
Vice President and General Counsel
Chesapeake Bay Foundation

before the

U.S. Senate Committee
on Environment and Public Works
Subcommittee on Toxic Substances, Environmental
Oversight, Research and Development

November 15, 1989

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to testify this morning about the Environmental Protection Agency's enforcement program. The Chesapeake Bay Foundation (CBF) is a non-profit organization working to protect and restore the Chesapeake Bay and its resources. We have over 70,000 members in all fifty states and twelve foreign countries, reflecting the true national stature of the Chesapeake Bay estuary.

Chesapeake Bay is a large but fragile body of water, extending almost two hundred miles from the mouth of the Susquehanna River to the Atlantic Ocean at the Virginia capes. Hundreds of rivers and streams drain into the Bay, carrying the waste from all or parts of six states -- including over 13 million people and 64,000 square miles. While we may refer to the Bay as a body of water, to those of us who work with it, it encompasses the vast network of tributaries that are the roots, indeed the life blood of the Bay. Remind yourself that you are now sitting in the Chesapeake Bay drainage area.

In order to care for this Bay, we at the Foundation must concern ourselves with a whole host of issues, from growth and development to fisheries management. It is our intent to see that necessary laws are enacted, that programs are properly carried out, and that our laws are fully enforced. It is this latter issue upon which we focus today. Although CBF's work has tended to focus on enforcement of the water program, we recognize that other programs, such as air and waste, are also critical. I might also point out that because of our interest in the Bay as an ecosystem, we see vividly the need for cross media pollution control programs and enforcement.

Enforcement on Chesapeake Bay

In the five years I have been with the Foundation, I have seen definite improvements in enforcement programs around the Bay. That's the good news. The bad news is that we still have a long way to go. When I left the Department of Justice in 1984 to join CBF, I thought that I was giving up my role as an enforcer and a prosecutor. I soon discovered that I had not shed that role at all. Instead I simply was doing it under the guise of a citizen enforcer rather than a governmental enforcer. At that time, the Chesapeake Bay Foundation was pursuing litigation against major polluters on the Chesapeake, because the government had failed to take action. Our suits, carried out under Section 505 of the Clean Water Act, had the effect that Congress intended. That is, companies such as Bethlehem Steel and Gwaltney of Smithfield came into compliance with their discharge permits, other industries were motivated to clean up their discharges, and strong pressure was exerted on the state and federal governments to improve their own enforcement capabilities. As a result, we have seen both the states and EPA Region III begin to focus more attention and more resources on enforcement of our water pollution laws. A recent survey by CBF of the compliance records of major dischargers on the Chesapeake showed that, by and large, these companies were in compliance with their discharge permits.

That, however, is only part of the story, because those major dischargers represent roughly 329 out of the almost 4,300 direct dischargers in the Bay watershed. While the "majors" comprise a large percentage of the wastewater flow, there may be many minor dischargers which significantly impact streams and tributaries. So far as we can determine, no one is really looking at these facilities in a coherent fashion. EPA is not reviewing minors, leaving it mostly to the states. For that reason, it is absolutely essential that state enforcement be as rigorous as possible. Past experience indicates this will only be done with stringent EPA oversight.

There are other areas of concern as well. Earlier this year, the Foundation released a report on implementation of the federal wastewater pretreatment program in the Bay area. Under this program, industries which discharge their wastes to municipal sewers rather than directly to water bodies are required to pretreat those wastes to reduce the impact of pollutants which can interfere with the treatment plants, pass through the plant to receiving streams, or contaminate the plant's sewage sludge. The onus is on the municipality to set up and run the regulatory program that governs these "pretreaters", with state and EPA oversight. As set forth in our report, we found problems at all levels of government. Municipalities were not adequately monitoring pretreaters and enforcing the program, and the states and federal government were providing inadequate oversight. We have gone further now and reviewed the compliance records of selected industrial dischargers. The picture is not good and calls strongly for additional enforcement. It seems unfortunate that groups such as mine must be the ones to bring such law suits when it is the government's primary responsibility.

I never know quite how to respond when an agency official tells me that they use the threat of citizen suits as a bludgeon to force industry into compliance. "We tell companies that if you don't settle with us, you'll have to deal with CBF or NRDC". While I am flattered, it also seems to me very sad that I should be in the position of being a more potent enforcement tool than my government.

The Timing is Right

It is timely to look at the enforcement issue. We have a new administration here in Washington that has indicated a strong commitment to environmental protection and a willingness to pursue a stronger enforcement role. There have also been developments in the water program. The pretreatment program, at least in the Chesapeake Bay region, is now essentially in place and the municipalities have had time to get their programs in order. To date, there has been a real reluctance on the part of the EPA and the states to take enforcement actions against municipalities and industrial pretreaters because of a belief that EPA and/or the states were responsible for flaws in the pretreatment programs. Indeed, they approved many programs which should not have been approved. As these flaws are being remedied, the time for enforcement approaches.

Another development is the implementation of the Water Quality Act provisions regarding toxic hot spots. New permits will be issued for facilities impairing water quality because of toxics, and enforcement will be necessary.

Finally, the EPA Inspector General's "Report of Audit on the Management of the Chesapeake Bay Program Point Source Pollution Program" has, at least in the Chesapeake Bay region, focused attention on a number of problem areas. The Inspector General found that EPA and the states were lax in taking enforcement action, especially against municipalities, and that EPA's oversight was inadequate to ensure proper coordination of enforcement efforts. We certainly agree with these findings, and it is my understanding that Region III itself has little disagreement. The question is, what will now be done.

Addressing the Problems

I perceive two major problems with EPA enforcement as a whole: EPA staff responsible for compliance do not have an enforcement "mindset"; and adequate resources have not been committed to enforcement. I was therefore pleased to see that EPA is now considering revamping its whole enforcement program. This is a welcome sign.

EPA has too often focused on implementation of regulations and programs, with very little thought for actual enforcement of the program requirements. Moreover, the staff members assigned to enforcement have not necessarily been trained to undertake that role. This results in a lack of direction and focus for the enforcement program. Having spent a number of years in the Land and Natural Resources Division of the Department of Justice, I think that EPA's enforcement program was more effective when there was a centralized effort. People understood their role and could more readily be held accountable. Headquarters and the regions were more likely to march in the same direction. Training is, of course, an essential element of a good enforcement program, and the Agency's proposal to establish a National Environmental Enforcement Training Institute is an excellent one.

As the Agency reviews how to organize its enforcement program, I urge them to consider establishing enforcement teams at both the headquarters and regional level. These teams should include both attorneys and technical staff who can give attorneys the advice and support they need at critical times in investigations and in enforcement actions. Relying on the program staff is very difficult. Often the program staff members have other assignments, and do not understand what is needed in enforcement actions. Technical staff should be assigned to the enforcement program and have as their sole duty staffing and providing litigation support for enforcement cases.

There should also be a clear focus on major cases and complex issues. It is disconcerting to see regional staff, or even headquarters staff, working on basic, simple cases. Region III should not have to spend its time bringing small municipal cases. That should be a function for the states. Instead Region III should be working on the more complex and sophisticated cases, especially in the toxics area.

The corollary here is, of course, that there must be strong state enforcement. That can only be achieved by strenuous oversight by the regions. This is not an easy task since the states are sovereign entities with their own programs and their own priorities. However, EPA can be more effective than it is.

One of the reasons it is difficult to get the states to undertake enforcement is that EPA has limited tools to penalize the states for failing to do so. The only major threat that EPA has is to withdraw the program, which has never happened, or to withdraw funding, which is also rare. One way to increase pressure on the states is simply by making their records public. The Agency should consider a "score card" for the states, perhaps even extended beyond the enforcement issues, so that citizens may see how their individual states are doing. This would be especially useful for people in my position. I find it difficult, if not impossible, to compare the states on other than an anecdotal and general impression basis. Just getting enforcement statistics is difficult, and they are often inconsistent. And when looking at statistics, we must always ask what definition is being used to determine compliance. I noted with satisfaction that the last quarterly noncompliance report, prepared by EPA Region III, shows specifically whether facilities are in compliance with the final effluent limits in a permit, or with an interim standard or an order. This is at least a step in the right direction. That helps us to focus on those plants that, while they may be meeting the interim limits, still have a long way to go. From my perspective, better measures of enforcement success are essential.

To improve enforcement, we must think creatively. I understand that EPA is considering geographically based enforcement initiatives. We would welcome such an effort on the Chesapeake Bay. We have sought for a long time to have enforcement officials focus on the Bay as a whole, not on a state-by-state basis. Although Region III now issues a quarterly noncompliance report for the Bay area, no further significant action has been taken. We envision a cooperative effort by the federal government and the states to sit down and pool their knowledge and their resources and come up with a coherent enforcement strategy. It seems that all of the appropriate enforcement officials, including the U.S. Attorneys and the state Attorneys General, could work together to identify major violators and to target enforcement actions. State and federal officials might agree to undertake responsibility within their jurisdictions for different cases, splitting them up according to the nature of the case and the resources required. There might even be efforts to file joint cases in special instances.

Better coordination could also be achieved with the many agencies which have staff in the field or on the water able to spot violations. For instance, I understand that in California state enforcement officials have regular meetings with agencies such as marine police, the Coast Guard and others who might spot water quality problems. This kind of concerted effort would maximize everyone's use of resources. Although there would certainly be coordination problems, such an undertaking could foster an atmosphere of cooperation, and help ameliorate the sometimes contentious situation we now have.

Finally, there is the matter of resources. The Agency must be given the resources necessary to carry out these programs. It is essential that the Agency be able to attract and retain highly qualified personnel. They cannot do this without adequate funding. We must back our directives with the money to carry them out.

I appreciate the opportunity you have given me today to express the Chesapeake Bay Foundation's views about enforcement. It is a subject that is very important to us on the Chesapeake Bay. Only if we have good laws, strongly enforced, can we hope to make the progress necessary to protect and restore this "crown jewel of estuaries."

Testimony of Joan Z. Bernstein
Before the
Subcommittee on Toxic Substances,
Environmental Oversight, Research and Development
of the
Committee on Environment and Public Works
United States Senate
November 15, 1989

I am pleased to appear before you today to comment upon the enforcement programs of the Environmental Protection Agency and to share with you my views on its past effectiveness and future directions and goals.

I am a graduate of the Yale Law School, and my career has included the private practice of law in New York, Chicago and Washington D.C. as well as government service as the Director of the Bureau of Consumer Protection of the Federal Trade Commission, General Counsel (and for a brief concurrent period, Acting Administrator for Enforcement) of the Environmental Protection Agency, and General Counsel of the Department of Health and Human Services. Another public service of which I am particularly proud was as Chair of the Commission on Wartime Relocation and Internment of Civilians. At present, I am Vice-President and General Counsel of Chemical Waste Management, Inc. one of the nation's major companies specializing in the treatment and disposal of hazardous waste.

I have been very fortunate that my career has afforded me so many opportunities to gain knowledge and experience -- from the perspectives of both the regulator and the regulated -- of important issues of public policy, environmental protection and civic responsibility. I appreciate your interest in hearing my views, and I hope that the insights I have gained will be of some use to you.

1. The Agency's enforcement success should be measured by real beneficial impact on the environment, not by amassing statistics on enforcement actions.

I applaud Deputy Administrator Habicht's announced intention to focus the enforcement program as a tool for achieving real environmental benefits. Although it is certainly laudable that in recent years EPA has stepped up its level of enforcement activity, I feel that the Agency has succumbed, to a certain degree, to a kind of myopia which measures enforcement success primarily in terms of raw numbers of cases brought and penalties assessed rather than measurable clean-up of the environment and prevention of further pollution. A new emphasis on enforcement cases addressing real contamination of our environment, rather than on technical or paperwork violations -- while perhaps requiring somewhat more effort to pursue -- is much needed. Similarly, we need a broader program that addresses all types of potential violators -- government and private facilities; generators, transporters, treatment and disposal facilities; large and small commercial facilities -- to ensure that a real impact on the environment can be achieved.

To implement this new focus, the Agency will have to develop appropriate specific criteria to measure its success, as well as sufficient baseline data regarding the true sources and levels of contamination of our resources, against which the environmental results of the enforcement program can be measured. The Agency should immediately begin to take steps to collect and analyze this data.

In support of this process, Congress in its oversight role should focus on the impact of the Agency's enforcement program in furthering the nation's environmental policy and goals. I would add that it is my strong personal belief that Congress should allow and indeed demand that the Agency assume its role as the expert manager of the nation's environmental program. Statutory directives should be broad enough to permit the Agency to fashion enforcement programs that work. Congress should resist the temptation to micro-manage the Agency and thereby stifle the Agency's creative and aggressive use of its expertise.

2. The Agency should set enforcement priorities that appropriately mirror and effectively implement the goal of achieving pollution prevention and remediation.

One of the most important tasks of the Agency is to set enforcement priorities that are based both on solid scientific assessment and genuine responsiveness to public concerns. I believe that the Agency recently has experienced a credibility crisis in its enforcement activities. On the one hand the Agency has occasionally exhibited a bureaucratic paralysis in its inability to stop major and open pollutant discharges, while at the same time taking well publicized major enforcement actions on the basis of technical or paperwork violations. I believe that in these instances the Agency does a serious disservice to itself and to its public constituency. As a result, the goal of achieving real environmental benefit is not advanced and the public's perception of the Agency's ability to manage its mission intelligently is damaged.

It is important to remember that an Agency enforcement action is a representation to the public about the environmental significance of the underlying activity. It is imperative that correct signals be sent to the public and to regulated entities about the Agency's enforcement priorities. For example, EPA enforcement in recent years has been highly effective in scrutinizing the large commercial waste management operators, but has been inadequate in policing the regulatory compliance of small operators, government owned facilities and facilities handling their own wastes on-site.

In the past, EPA reasonably determined that with limited resources to police compliance, it would target high-profile facilities -- and assume that others would be deterred from non-compliance by these well-publicized examples. The commercial hazardous waste management industry, for example, consistently has been the focus of EPA's attention. These highly specialized commercial facilities, which exist to handle the most concentrated hazardous wastes generated by others, tend to have high community profiles, are subject to a broad array of regulatory requirements, and invite the most sophisticated government review. In 1987 nearly half of all inspections of non-federally owned hazardous waste management facilities were of commercial facilities, despite the fact that commercial facilities handle only approximately 5% of the hazardous waste generated in the United States. The result of this intense EPA scrutiny clearly has been beneficial in eliciting the large commercial operators' best efforts at regulatory compliance. I think it is fair to say, however, that the deterrent effect on other sectors has not been measurable, and the overall gains in real environmental protection have fallen far short of what was possible.

The Agency has begun to diversify its efforts, in 1988 reducing its concentration on commercial facilities to one-third of its inspection effort, but this trend should accelerate. All sectors of waste management and other regulated facilities -- treatment, storage and disposal facilities; on-site and off-site facilities; publicly or privately owned facilities -- must have equal respect for the law, grounded on equal apprehension of rigorous inspection.

Another area affecting the credibility of the Agency's enforcement program is its failure to enforce certain of its existing regulations. The general public continues to show grave concern about waste management, in one poll rating hazardous waste disposal the country's most serious environmental problem and opposing by a two-to-one margin siting a solid waste landfill in the respondent's vicinity. A large measure of this concern stems from environmental problems caused by older, unpermitted sites, not modern, well-designed, state- or federally-regulated facilities. Yet EPA has not taken aggressive action to remedy this problem.

For example, EPA has failed to enforce the 1985 deadline for closure of hazardous waste facilities not seeking a RCRA permit. Over 1,100 hazardous waste facilities lost RCRA interim status in

1985 because they failed to provide the certification of groundwater protection and financial assurance and the permit application necessary to continue operations. Three years later, one third of these facilities did not have closure plans approved by the Agency; ten percent had not even bothered to submit a plan. All of these sites must be closed or upgraded according to standards designed to minimize the potential for releases into the environment. EPA should make closure of unpermitted hazardous waste sites an enforcement priority.

EPA also has failed to exercise any national leadership in closing solid waste "open dumps." Under RCRA Subtitle D, nonhazardous waste facilities failing to comply with RCRA Subtitle D standards -- appropriately termed "open dumps" -- must be closed by the states. EPA is to provide assistance by inventorying open dumps and assuring that each state has a timely and effective plan for closing those facilities. Currently, EPA is providing virtually no such assistance.

EPA also has failed to enforce its own policy against "sham recycling." EPA inaction has permitted hazardous waste facilities who burn and "recycle" hazardous waste into commercial products to operate outside of virtually all of the substantive requirements of RCRA. Many of these facilities produce a residue (undistinguishable from hazardous waste incineration ash) which is placed on the ground -- virtually anywhere -- without any environmental controls. EPA's inaction is having a directly adverse impact on the environment and encourages entry into the hazardous waste business of "recyclers" who expect a regulatory free ride.

3. The Agency should reorganize compliance and enforcement functions to facilitate cross-media enforcement and integrated legal and technical initiatives.

I believe that the Deputy Administrator's intention to employ cross-media enforcement initiatives is an important step in maximizing the ability of the Agency to effect both pollution prevention and remediation. Indeed, this is something that the enforcement program perhaps should have been doing all along. I suggest that this process would be facilitated by moving the enforcement and compliance functions out of the program offices and giving them the direct technical and legal support they need to make expeditious cross-media enforcement judgments. (I would add parenthetically that such a structural change would also help to ensure the separation of program and enforcement functions that the Seventh Circuit pointed out some time ago is mandated as a matter of law.)[1]

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[1] See Bethlehem Steel Corp. v. EPA, 15 Env. Rep. - Cas. 1513 (7th Cir. 1980).

Along these lines, I support the Administrator's plan to consolidate federal facility enforcement into a single office within the Office of Enforcement and Compliance Monitoring, but would urge that the Agency not stop there. I also support increased training for federal and state investigators, inspectors, prosecutors and technical staff. I can offer Waste Management's wholehearted support and considerable technical expertise in developing these training programs.

4. The Agency must focus on enforceability of its rules.

I also applaud the Deputy Administrator's recognition that the Agency needs to devote greater attention to the question of enforceability of its rules and regulations. It would be particularly useful for the Agency to issue an enforcement plan when a regulation is promulgated.

The question of enforceability should be a part of the regulation drafting process from the word go. A regulation must be clear and understandable. If it is not, the regulation itself becomes an impediment to its enforcement, particularly to a finding of criminal knowledge and intent. Where, as in the case of the just released "third third" land disposal ban, the preamble to the regulation alone goes on for over 650 pages, it will become increasingly difficult to convince judges that the law can justly presume knowledge and comprehension on the part of the violator of what the regulation requires.

The Agency should also consider building self auditing requirements and incentives into consent agreements and regulatory programs. These audits allow for the development and use of specialized methodologies suited for monitoring compliance in particular industries. These techniques can be very effective in producing continued compliance if policed appropriately and if structured to avoid disincentives. For example, based on the same concepts as its internal financial audit procedures, Waste Management has developed a highly structured and, WMI believes, very effective self auditing mechanism, designed to detect and prevent or remedy potential environmental compliance problems. As environmental regulation becomes broader in scope and more complex, regulation will not succeed without voluntary compliance. Thus, it is in the best interest of both the government and business to encourage the use of private, professional environmental audits to do the vast volume of routine inspecting.

I understand that California has already established a registry of state certified private environmental auditors. These professionals, working at the interface between government and those subject to regulation (rather like CPA's), would evaluate and comment upon the environmental practices of their business clients. Such a profession could also (like CPA's) be legally accountable to both its business clients and the public, and could be supervised by the government. An EPA program that permitted a self auditor to detect and correct certain initial problems without obligation could go a long way toward advancing the enforcement goal of real environmental improvement.

5. **The Agency should select an enforcement remedy that provides the most expeditious environmental remediation.**

Although I appreciate the Agency's desire to place greater emphasis on criminal enforcement for its deterrent impact on other violators, I would caution the Agency to take care that this new emphasis does not in fact result in a delay in actual environmental remediation. In particular, the Agency should ensure that where criminal prosecution is chosen, civil or injunctive remedies are also pursued as expeditiously as possible.

6. **The Agency should make a greater use of Alternative Dispute Resolution.**

Another way to enhance the enforcement process is the use of Alternative Dispute Resolution (ADR). There are several ADR techniques -- mediation, arbitration, fact finding, and mini-trials -- which involve the use of neutral third parties to facilitate the resolution of all or part of a dispute as an alternative to formal litigation. EPA has issued final guidance on the use of Alternative Dispute Resolution to facilitate the negotiation of consent decrees and Administrator Lee Thomas strongly encouraged the Regions to nominate cases which meet the criteria for ADR.

Innovative approaches such as ADR may be useful for routine matters which do not warrant the costs of formal litigation or for cases with multiple parties or issues which would be extremely expensive and time-consuming to try. They may also be useful in situations where personality conflicts or poor communications among the negotiators make it difficult for parties to move off established positions; where difficult technical issues may benefit from independent analysis; or simply to avoid clogged judicial dockets.

Despite these advantages and its own professed intentions, the Agency has been slow to adopt these techniques in actual practice. According to a recent article,[2] over the four year period ending in 1988, EPA referred 1,545 civil cases to the Justice Department. In the same four year period, only 250 judicial consent decrees were signed. Since mid-1987, EPA has initiated formal mediation in only one case involving the Safe Drinking Water Act and three cases under Superfund. Three of the four cases have settled and the fourth and largest began mediation in July 1989. ADR is a useful and cost effective tool that works. The Agency should renew its efforts to employ this tool.

Once again, I appreciate the opportunity to share my views with you and I offer Waste Management's full cooperation and support to EPA in its review of its enforcement role and the measures of its success. I would be happy to respond to any questions you may have.

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[2] S. Rennie, "Kindling the Environmental ADR Flame: Use of Mediation and Arbitration in Federal Planning, Permitting and Enforcement" 19 Env. L. Rep. 10479 (Nov. 1989).

January 16, 1990

The Honorable Joseph I. Lieberman
United States Senate
Washington, DC 20510

Dear Senator Lieberman:

Enclosed are the responses of Joan Z. Bernstein to your follow-up questions in connection with the hearing of the Subcommittee on Toxic Substances, Environmental Oversight, Research and Development on November 15, 1989.

Waste Management appreciates the opportunity to participate in the hearing and we would be pleased to provide additional information or assistance to the Subcommittee at any time in the future.

Very truly yours,

Jane Seigler

Jane Seigler
Government Affairs Counsel

January 16, 1990

The Honorable Joseph I. Lieberman
United States Senate
Washington, DC 20510

Dear Senator Lieberman:

I am pleased to submit the following responses to your questions in connection with the hearing of the Subcommittee on Toxic Substances, Environmental Oversight, Research and Development on November 15, 1989.

Questions for Panel 3

1. POLLUTION PREVENTION (to both panelists)

EPA is placing an increased emphasis on pollution prevention including cross-media initiatives. For example, the Deputy Administrator testified that in order to address many of our environmental problems it may be necessary to break down the often artificial categories of air, water, waste and toxics.

Question:

What is your reaction to this approach? I would appreciate if Ms. Powers would specifically address the issue of whether she believes an emphasis on pollution prevention will help improve the water quality of the Bay.

Response:

The primary mission of the Environmental Protection Agency is to protect and enhance environmental quality. Therefore, an enforcement effort that focuses on pollution prevention, as well as on remediation and punishment of violators, is crucial to the Agency's success.

The use of cross-media enforcement initiatives is an important step in maximizing the ability of the Agency to effect pollution prevention. As I said in my testimony, I believe that the effectiveness of these cross-media initiatives would be enhanced by moving the enforcement and compliance functions out of the program offices and by creating unified enforcement teams of legal and technical staff.

There are other important additional steps that should be taken, however, to advance the goal of pollution prevention. These include what might be called "cross-facility" initiatives, that is, a broad program that addresses all types of potential violators -- government and private facilities; generators, transporters, treatment and disposal facilities; large and small commercial facilities. It seems plain that significant strides in pollution prevention cannot be made when Agency scrutiny of small operators, government owned facilities and on-site facilities -- which in the hazardous waste area, for example, handle 95% of the hazardous waste generated in the United States -- admittedly has been inadequate or non-existent.

Additionally, there are large areas of existing regulations governing serious threats of environmental contamination that EPA has largely failed to enforce. A rededicated effort to address these areas -- to close unpermitted hazardous waste facilities, to enforce the policy against "sham recycling" and to assist the states in closing solid waste "open dumps" -- would go a long way toward achieving pollution prevention.

Finally, the Agency should support and encourage the development of voluntary compliance programs that would provide incentives to discover and correct compliance problems before they result in environmental contamination.

2. AUDITING (to Jodie Bernstein)

In your testimony, you suggest that EPA should institute policies which will increase self-auditing by corporations, including giving the corporations a short period of time after an audit to disclose violations with some type of immunity.

Another approach might be for the Congress to mandate audits by independent third parties with the results provided to EPA. Why isn't the mandatory approach a better one for achieving compliance with the environmental laws?

Response:

I believe that Agency-sponsored programs designed to foster environmental compliance by providing incentives to detect and correct potential problems before they result in environmental damage are essential to the success of pollution prevention.

For example, companies could develop self auditing mechanisms, based on concepts similar to those currently employed by many industries in their use of independent internal financial audit procedures. (These mechanisms would have the added benefit of allowing the development and use of specialized methodologies suited for monitoring compliance in particular industries.) Assuming that these audits would be conducted at regular intervals and with the same independence from line operating responsibility as internal financial audits typically have, EPA could provide that certain types of compliance problems (e.g., those where no environmental contamination has occurred) need not be reported to the Agency if corrected within a brief specified period after discovery. I believe that such a system would go much further in encouraging companies to diligently seek out and correct potential problems than a rigid requirement to report, for example, even the smallest and most benign paperwork or technical violations. The benefits of such a system cannot be overlooked if pollution prevention rather than post hoc pollution punishment is truly our ultimate goal. Moreover, we need to recognize that as environmental regulation becomes more complex, the regulatory scheme simply will not succeed without voluntary compliance. Thus, it is in the best interest of both the government and business to encourage the use of such self-auditing mechanisms.

A program encouraging the use of such mechanisms would not be inconsistent with requiring periodic mandatory audits by independent third parties with the results provided to EPA. I understand that California has already established a registry of state certified private environmental auditors. Such independent professionals (much like CPAs) could be used to evaluate and comment upon the environmental practices of their business clients either in the context of the voluntary self audits discussed above, or in preparing periodic mandatory audit reports for submission to the Agency. The development of such a profession that would (like CPAs) be subject to uniform certification and practice standards and that would be legally accountable to both its business clients and the public, makes a great deal of sense.

Obviously, however, if mandatory third party auditing is to have any real beneficial impact in achieving compliance with the environmental laws, it must apply to all types of facilities -- large and small; government and private; generators, transporters, treatment and disposal operations. Otherwise the vast majority of compliance problems and potential sources of future environmental contamination may be overlooked.

I appreciate the opportunity to provide these additional comments and will be happy to provide you, Senator, and the Subcommittee with whatever additional information or assistance you may require.

Respectfully submitted,

Joan Z. Bernstein /p

Joan Z. Bernstein
Vice President and
General Counsel
Chemical Waste Management, Inc.

TESTIMONY
OF

JUDSON W. STARR, ESQUIRE

of

VENABLE, BAETJER, HOWARD & CIVILETTI

BEFORE THE

SUBCOMMITTEE ON TOXIC SUBSTANCES,
ENVIRONMENTAL OVERSIGHT, RESEARCH AND DEVELOPMENT

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

on
November 15, 1989

INTRODUCTION

Thank you for the opportunity to appear today before the Subcommittee to attempt to answer any questions you might have with regard to criminal enforcement of the nation's environmental laws. It is important for me to say at the outset that it is a privilege for me to once again appear with EPA's Deputy Administrator Habicht. You should be aware, as I know Hank is, of my deep and continuing support for his extraordinary leadership skills and for his personal integrity and sense of fairness. I had the rare opportunity and privilege of working closely with him -- Hank would not like me to say "for him" -- during his tenure as the Assistant Attorney General of the Lands & Natural Resources Division at the Department of Justice. Similarly, I am also pleased once again to join my colleagues Tom Gallagher and Don Mielke whose hard work and dedication to the criminal enforcement of the environmental laws at the state and federal levels have always been evident.

BACKGROUND

Not since the early days of the American Revolution has Boston Harbor come to symbolize such a rallying cry for a general call to arms as it has since candidate Bush campaigned for the Presidency there and generally received credit for raising the debate on environmental issues to the forefront of the national agenda. What the other campaign symbol of

Willie Horton did for prison furlough programs, Boston Harbor has become for environmental protection -- they both created an enormous expectation among the voters that a general crackdown against past and future environmental abuses would follow a Bush victory. It is not surprising that this expectation also comes at a time when terms like the greenhouse effect, acid rain, ozone, medical and hazardous wastes, have entered the every day vocabulary of all Americans and sounded an alarm as never before.

How then can this Congress capitalize on the public's affirmation of the importance of environmental issues as they impact their daily lives. While undoubtedly there are many answers and all of them are complex, one thing is certain: the failure to recognize and seize the opportunity as it exists in this current atmosphere will risk disappointment, breed cynicism and create an even greater backlash than those previously experienced by earlier Administrations in whom the expectations were considerably lower.

Of all the things this Congress might do, one answer can be found in the federal environmental crimes program -- a program whose goal is sending to prison corporate officials who are responsible for allowing polluters to violate the law in the corporate name. In no other EPA program -- its enforcement program or the many others -- can this Congress more immediately get a bigger bang for its investment and at the same time enhance the respect of the federal effort. In no other program can Congress more quickly achieve better compliance with the laws EPA is charged with enforcing or obtain greater deterrence against future abuses. Furthermore, if this Congress is interested in getting the attention of and in unifying behind it the federal effort, the regulated community, and the general public by finding an issue that neither can or would oppose, then criminal enforcement of the environmental laws is such an issue. How can anyone be against a program to promote EPA's most powerful enforcement tool to punish those who act egregiously to pollute the environment? Moreover, criminal enforcement provides an excellent opportunity for Congress to impact EPA's enforcement strategies and increase the morale and motivation of its professional and dedicated employees. The results this program can deliver, relative to EPA's other programs, are simply more immediate, tangible and real worldly.

Criminal enforcement of the environmental laws is neither a new idea nor, as is evident, is it un-Republican. When viewed objectively, few can fault the Reagan years for its lack of white-collar prosecutions. In banking, securities and defense procurement, the overall record has been generally applauded. Adding to that record, in 1982 in the middle of Reagan's first term and right in the midst of the Gorsuch scandal, an initiative similar to those in the other heavily regulated fields was begun in the environmental area. With the blessings of the top policy makers at both the Department of Justice and at EPA, those agencies combined to form the first program with the single mission being the enforcement of the criminal sanctions of the environmental laws.

It was an idea whose time had come. Just as with the other heavily regulated industries -- banking, securities and defense contracting -- EPA, like the SEC, DOD and those agencies which regulate the banking industry, allowed for an initial period to first adjust to the new requirements of those laws after Congress passed them. Violations were punished initially through administrative sanctions in order to remove any economic advantage the violator had obtained over competitors. After a period of time, those same violations were later punished through the use of civil sanctions designed to remove any competitive advantage and to punish the offending parties by obtaining penalties in the form of higher and higher fines. Consent Decrees with stipulated penalties were employed as a means of obtaining compliance into the future.

However, what both administrative and civil sanctions have in common is that they serve to punish only the corporate entity -- and not the decision-makers responsible for the acts done in the corporate name -- through fines which are generally charged back to the consumer through higher prices. Missing was any deterrent. The government, however, has since learned that the most cost effective way to shape corporate decision-making and to insist upon compliance with the law is to use the available criminal laws aimed personally at the decision makers themselves.

The same principle long applied to other heavily regulated fields had by 1982 at last caught up with the environmental laws. This is true even though environmental criminal laws had been on the books since the the modern environmental laws were enacted in the 1970's and as far back as 1899 in the Rivers and Harbor Act. Most of those laws, initially only misdemeanors, have been upgraded since by Congress to felonies. In passing those felonies, Congress at least has been saying to EPA to do more. Other examples of Congressional support and prodding abound such as the recent passage of legislation granting EPA's criminal investigators full law enforcement powers.

RECOMMENDATIONS

Although EPA and the Department of Justice have slowly and steadily been building an impressive record, objectively speaking, since 1982, there is much this Congress can do to bring criminal enforcement to the forefront. Most important is the need to add more investigative resources. Congress also can foster the creation of a voluntary disclosure program to encourage corporations to actively cooperate in policing themselves by seeking out and preventing wrongdoing -- one of the obvious objectives of the criminal enforcement programs. Congress can also support a more coordinated effort to see that the Department of Justice and EPA more effectively coordinate under one umbrella with the FBI, OSHA, Customs and the Departments of Transportation and Defense which all have overlapping environmental, health and safety responsibilities. Given the returns, these are such minor investments -- both in capitol and in political costs -- that the failure to make them will only beg the question why.

Few people know that since 1982 over 565 indictments have been brought, over 432 corporations and their officers and managers have been convicted, over $26 million in fines have been paid and over 270 years of jail time have been imposed of which over 100 years have actually been served. While impressive to many, it is a mystery to us all that this record and what it says about past EPA's resolve is not better known. Although they never publicly or privately indicated to the contrary, prior Administrators at EPA never made the public commitment to this program. The absence of any embarrassing incidents and the professionalism of people at both EPA and the Department of Justice who are involved in this program make getting behind it an easy step.

However, to truly understand the environmental crimes program it is essential to first comprehend that it is not EPA's program alone. Perhaps in more than any other EPA program, the Department of Justice is involved at an earlier stage in the criminal enforcement process in ways that impact overall enforcement strategies. What criminal cases to bring, when to bring them and where are essentially a DOJ call. The power to initiate and decline criminal cases, to effect search warrants, grand jury subpoenas, immunities and to conduct criminal trials, plea agreements and appeals rest by law with the plenary authority of the U.S. Attorney General or his authorized designee. Unless things have changed since I left the Department of Justice in September 1988, the Department of Justice is probably not about to relinquish its time-honored authority in criminal matters any more for EPA than it does for the SEC, IRS, DOD or others. DOJ is therefore a key player in more than in theory. In actual practice, DOJ is traditionally "in tune" with EPA's law enforcement investigators. Together, the prosecutor and investigator know more about the hard work and persistence that it takes to develop evidence to successfully support a criminal case than is sometimes apparent from afar, particularly when the observers have limited experience in criminal law.

As EPA's enforcement program is currently set up the manner in which a case is selected to be handled, whether administratively or through civil or criminal enforcement, is left too much to happenstance. Through its oversight responsibilities and funding capabilities, Congress can assist in changing this. Presently, the way a case is handled depends too much on which bureaucrat's desk the case first arrived.

Among other things, this is unfair to the regulated community. Without any notice as to how a particular violation will be handled by the Agency, the regulated community has no guidance. This makes its self-policing activities difficult, if not impossible to do well. Furthermore, it does not serve the criminal program well when one company is criminally indicted for certain violations and the same violations committed by another company are handled as minor administrative matters. Under the present "system," there is too much risk of such an occurrence.

While it sounds simple enough, EPA has not yet created a screening system to earmark certain cases as criminal and others as administrative or civil. The Justice Department tries to do this for EPA when cases are referred there but undoubtedly cases fall through the cracks because so little is known about the actual nature of the violations and by whom they were committed until the lengthy discovery or investigative process runs its course. Further, criminal investigators tend to find violations that will inevitably not turn up in the rarefied atmosphere of civil discovery.

The reason no system has been devised is obvious. A good centralized system, like those implemented by many states with active environmental criminal programs, must give a top priority to criminal cases. Under this system, every enforcement matter is screened first as a potential criminal case by prosecutors and criminal investigators whose noses have been trained to detect criminal violations. What they do not choose to pursue is left for administrative or civil handling. At EPA presently such a system is lacking because the necessary commitment has not been made to make criminal cases the priority such a centralized system requires. Also stemming from an apparent lack of commitment to make criminal enforcement a top priority, is the lack of investigative resources necessary to implement this system.

The backbone of the criminal program, EPA's criminal investigators, now number nearly sixty to cover the entire country. Some states have nearly that many investigators just to police environmental compliance in their states. EPA's investigators, many of whom came to the Agency with substantial law enforcement experience with other federal agencies, give EPA a totally new ability to ferret out and collect evidence about violations of the environmental laws. Previously, scientists and others with technical backgrounds had been EPA'a chief inspection resource. If a violation occurred after business hours, it would most likely go undetected. If illegal acts were concealed in the morass of paperwork or were committed by those who never "joined" the system, those too went undetected. Even though in recent years, the FBI has joined the fray as part of its overall crackdown on white collar crime, the present number of EPA's special agents is inadequate to accomplish the task at hand. Congress needs to at least double the number of investigators at a minimum, even if it means taking resources from some other program.

Given the present number of investigators, cases investigated by EPA and prosecuted by the Justice Department are based by necessity upon a reaction to violations after the violations are discovered and the harm is done. Few of their cases can be proactive or the product of a reasoned or targetted focus on suspected wrongdoing because their numbers are so small. As a consequence, EPA's limited resources are not directed toward uncovering practices which would then provide the greatest public exposure and deterrence. On the other hand, EPA must also maintain its capability to react to information developed "off the street," because the failure to do so will mean that its ability to collect such information will "dry up" if no one is paying it any attention.

As DOJ's statistics attest, fully half of the environmental indictments and convictions have fallen on companies often thought of as household names. However, with more investigative resources additional investigators would be available to pinpoint particular industrial practices in particular geographical areas and enable them to bring cases with a higher deterrent value than those presently being brought. As but one example, investigative resources should focus on the responses by potentially responsible parties to EPA's request for data under Superfund's Section 104. Since those responses heavily influence how EPA will respond to clean up hazardous waste sites, whether one will be a responsible party to any action EPA brings, and the extent of that party's potential liability, there is a natural temptation to respond less than truthfully. Presently there is little verification of the accuracy of this important cog in the wheel. This same principle could apply equally to all the other EPA programs requiring the filing of various reports and information.

Criminal enforcement and EPA's enforcement in general would be better situated if its regulations were written with the slightest thought to the enforcement of those regulations. The people who write them believe, or so it appears from their product, that everyone is going to follow them. Of course, not everyone does. People involved with day-to-day enforcement realities and grounded in the real world should have some impact in determining the quality of those regulations from an enforcement perspective. Unfortunately, more often than not the best defense to a violation is the regulations themselves. This is the case in spite of the fact that everyone would agree, as most juries do, that the underlying acts in violation of the regulations are criminal and should be punished. Insuring that EPA's regulations can pass enforcement muster is a task for EPA's lawyers. Instead they too often spend their time directing investigators. EPA's operational efforts should be directed by an investigator who has the authority to direct the lawyers and technical resources where assistance is necessary to support EPA's investigations. Presently, the opposite situation exists.

Lastly, Congress could assist in implementing a voluntary disclosure program. This is a novel concept in the environmental area but it has worked with some degree of success in other sectors. The purpose of such a program is to encourage corporate self-policing by stimulating corporations to develop internal compliance programs. To some limited degree, EPA already encourages corporations to perform internal audits. Those practices should be modified to further encourage an independent assessment of the potential for criminal liability. Given the fact that criminal enforcement translates directly to criminal liability for corporate officers, it is they who should want the protection such an independent assessment would provide. Once such an assessment is performed, however, corporations then should have a place to disclose the information that the assessment brings to light. However, in order to increase corporate participation in such a program, Congress needs to supply the appropriate incentives.

One incentive obviously is the fear of prosecution if caught violating the laws. Too often, otherwise law-abiding corporate representatives mistakenly perceive that only "midnight dumpers" are being prosecuted or, more likely, that compliance problems within their corporations could never be considered serious enough to be criminal. Adding more investigative resources and making the criminal enforcement program more visible would serve to get their attention. Strengthening EPA's existing debarrment program -- too long dormant -- could also create an additional incentive. Moreover, if a voluntary disclosure program were created and the failure to participate later became known at sentencing, more corporations also would have an incentive to partake.

But corporations also need a sweetener. In creating a voluntary disclosure program, corporations which make a serious and responsible effort to comply with the law and who then promptly and completely disclose misconduct and fully cooperate, should not be discouraged from participating in such a program by inflexible prosecutive policies. While voluntary disclosure of wrongdoing would not be the sole basis for declining criminal prosecution, it is one of a number of factors which should be favorably considered by EPA and DOJ in deciding how or whether to charge a case. Conversely, the failure to have an internal compliance program (or to have one but not to follow it) and to opt against participation in the disclosure program should also be relevant in deciding what charges to bring. Attention could also be given by Congress to the enactment of a limited self-evaluation privilege which protects the evaluation process from becoming a sword to be used against a company, but that also does not become a shield to conceal potentially illegal acts.

CONCLUSION

Congress is no doubt aware of the high expectations which were created during Bush's campaign for the presidency and by the appointment of its Administrator and Deputy Administrator. They inherit an agency with a multitude of responsibilities where no one problem has any solution which pleases everyone, including those of you in Congress. However, when all things are said, Congress has charged DOJ and EPA with enforcing a myriad of laws which are all designed to protect the environment and the public's health and safety. Given the number of years those laws have been on the books, it is only fair to put those who are required to obey them on notice that their failure to comply will be treated fairly but severely. If you have any questions, I would be pleased to answer them.

5095z

Statement to be delivered November 15, 1989 to the Subcommittee on Toxic Substances, Environmental Oversight, Research and Development of the U.S. Senate Committee on Environment and Public Works

COMMENTS ON EPA'S ENFORCEMENT PROGRAM

Thomas P. Gallagher

My name is Thomas P. Gallagher, and I am currently in private practice in association with the firm of Lawler, Matusky & Skelly Engineers, Pearl River, New York. Prior to my entry into private practice, I was an employee with the U.S. EPA and its predecessor organizations for more than 25 years. All of my public service career has been spent in environmental enforcement. For more than 18 years, I was the Director of EPA's National Enforcement Investigations Center (NEIC). The Center is responsible for providing case preparation investigative support, technical expertise, and information management services to EPA's administrative and civil enforcement program on a national basis and across all programs of environmental regulation. In addition, NEIC manages and directs, on a national basis, the criminal investigation component of the U.S. EPA's criminal enforcement program. I appreciate this opportunity which the Committee has provided me to comment on EPA's enforcement efforts. I would first like to comment on the development of EPA's criminal enforcement program.

A. Criminal Enforcement

Criminal investigation capabilities have come a long way in the Agency since the period 1979 - 1980, when a policy decision was made to initiate a program for criminal enforcement. During the development of such a program, it became apparent to several of us in EPA and the Department of Justice that successful implementation of an environmental criminal investigation capability depended upon the recruitment and training of a professional cadre of criminal investigators to complement the already existing, and equally necessary, technical and scientific capabilities which are essential to any successful case preparation in this field. In 1982, EPA recruited about 20 professional criminal investigators from other Federal, State, and local agencies. The direction and management of the criminal investigation component of the Agency's criminal enforcement program was formally transferred to the NEIC in 1983 because of its unique capability with respect to the necessary technical, scientific, document control, and information management components in criminal investigations, as well as its demonstrated capability to manage the evidence gathering aspects of large-scale environmental judicial case preparations.

Since 1983, great progress has been made with respect to the evolution of criminal enforcement within EPA. Productivity in terms of the number of investigations by NEIC and subsequent indictments and convictions by the Department of Justice have steadily increased. The issues addressed by these investigations and indictments are setting notable precedents in the field of environmental law. NEIC has developed the necessary critical team approach among criminal investigators, technical and scientific personnel, computer intelligence and information management capabilities and document control support; all of which are critical to successful environmental criminal case preparations. The Department of Justice, through its Land and Natural Resources Division, has established an Environmental Crimes Section, a group of prosecutors with legal expertise in environmental crime who work closely with the NEIC and U.S. Attorney's offices. The Federal Bureau of Investigation has complemented these activities by providing additional investigative work years and emphasizing hazardous waste investigations in its accountability system. The NEIC, in cooperation with the Agency's Office of Waste Programs Enforcement and the National Association of Attorneys General, has sponsored the formation of four Regional Associations involving 42 states to encourage development of State and local criminal enforcement capabilities through information exchange on compliance matters and case preparation training. The Department of Justice has established a National Environmental Enforcement Council consisting of Federal, State, and local representatives to further emphasize criminal enforcement. NEIC, in cooperation with the Federal Law Enforcement Training Center, has established a number of professional training courses, not only for EPA's own investigative, scientific, and technical personnel, but also for State and local environmental criminal investigative organizations. Finally, since 1984, Congress has repeatedly demonstrated its commitment to environmental criminal enforcement by upgrading of criminal acts from misdemeanors to felonies with substantial increases in associated penalties in all of EPA's re-authorized legislation. Congress further demonstrated its confidence in the program when it granted full statutory law enforcement authority to EPA/NEIC's criminal investigators in 1988.

The high credibility and continuing achievements in the nation's environmental criminal enforcement efforts are a tribute to the men and women of EPA's National Enforcement Investigations Center, the Department of Justice's Environmental Crimes Section, the National Association of Attorneys General, the Federal Law Enforcement Training Center, the Federal Bureau of Investigation, the State criminal enforcement Associations, and prosecutors at the Federal, State, and local level, all of whom have worked extremely hard over the last five years to compile an enviable record of accomplishment.

I would note, however, that a well-managed and directed criminal environmental investigation capability is but one component of an overall EPA criminal enforcement program. It is long past the time when EPA, on the highest level, should affirm an Agency commitment to the criminal enforcement process as an integral part of its compliance and enforcement activities, and I am pleased to see such a commitment in the Deputy Administrator's statement. Based on my past association with him in his role as Assistant Attorney General, I know him to be a forthright and constant advocate for environmental criminal enforcement. However, this high level commitment needs to be communicated clearly and continuously to EPA's Program and Regional Offices, other Federal, State, and local regulatory agencies, and the regulated community, until they finally believe it. EPA also needs to address other issues that are extrinsic to, but supportive of, the criminal investigation capability. These include:

A. Development of long-term planning policies and strategies which are reflective of probable new legislative requirements and the regulations to implement those requirements. This will mandate close coordination with the legislative liaison process and the regulation development process within the Agency to assure that criminal enforcement needs are taken into account and to reduce and/or eliminate barriers to criminal enforcement in the final regulations. It's one thing to write a law and the regulations which implement it; quite another to enforce it, especially with the burden of proof required in criminal cases.

B. Development of a system to define clear and specific priorities and objectives to be followed by the NEIC in its management of criminal investigations, as well as EPA's Regional Offices when referring information for potential criminal investigations. These priorities should reflect common concerns across all EPA regulatory programs.

C. Definition of meaningful measures of accomplishment. The existing Agency Strategic Planning and Management System outputs have been based on a fundamental misunderstanding that assumes that the criminal case preparation process is parallel to the administrative and civil case preparation process. Criminal case "referrals" to the Department of Justice by EPA do not have the same significance as with the civil enforcement procedure. If realistic measures were instituted, such as indictments, counts and numbers of individuals and companies, it would parallel Department of Justice indicators and would mandate a very close, supportive relationship by EPA-OECM with the Department of Justice Environmental Crimes Section to cooperatively monitor the timely progress of NEIC case investigations.

D. Significant expansion of the already existing outreach program to State and local prosecutors and regulatory agencies, through the Regional Associations, as well as training courses at FLETC. Because EPA legislation requires delegation of regulatory program operations to the States, it is clear that this is where a large measure of specific information appropriate for criminal enforcement exists. The relatively modest existing program administered by the NEIC needs to be significantly enhanced. In my opinion, the existing effort, at a very modest cost, has leveraged a much greater return through State and local organizations participating in the criminal enforcement process. In connection with this recommendation, the NEIC needs to expand its already strong capabilities in dissemination of compliance intelligence and information across all program areas to more fully support State and local criminal investigative agencies, as well as its own Office of Criminal Investigations.

If EPA does implement the above functions, such that issues associated with these functions are addressed in a systemic manner rather than sporadically and reactively, I believe that the Agency will have a well managed criminal enforcement program where the goals and responsibilities of all organizational elements are clear. NEIC, as part of its management responsibilities for the criminal investigation component of the criminal enforcement program, has requested attention to these issues for several years. Efficient management of these other issues by EPA's Office of Enforcement and Compliance Monitoring will also reduce or eliminate an unfortunate recent tendency toward micro-management of the operational and administrative aspects of the criminal investigation process. The Deputy Administrator's statement addresses some of these questions through the recommended accountability changes.

In this regard, I am somewhat disturbed by the Deputy Administrator's statement with respect to a potential restructuring of the criminal enforcement program. I have now been in private practice for eight months and I can assure you that the regulated community and the States clearly understand the prominence which environmental criminal investigations have come to display. I have already reviewed the substantial accomplishments of the criminal investigation component of the program over the past six years under NEIC management; accomplishments which Mr. Habicht has generously acknowledged, and for which he, personally, deserves a great deal of credit. I have outlined a number of activities which I believe the Agency needs to efficiently institutionalize, on a systematic basis, in order to ensure a fully complementary criminal enforcement program. An office was established within OECM two and one-half years ago to accomplish this goal. Its responsibilities include precisely the tasks enunciated in the Deputy Administrator's and my statement; i.e. strategic planning, impacting the regulation development process, coordination of priorities, etc. Consequently, I do not understand the rationale for an organizational restructuring. The prominence of the program is already there: this hearing is evidence of that. The organizational structure is already there to accomplish the necessary goals. OECM should address itself to assuring that its existing headquarters structure continues to improve its effectiveness, consistent with the functions it established two and one-half years ago. Another restructuring of the criminal enforcement program will inevitably reduce the excellent productivity, momentum and morale of the criminal investigation component of the program. In addition, it could adversely affect the personal goals and professional careers of the persons who have done the most within the Agency to assure the success of the program. Finally, it would increase the overhead of the program whose major need is more on-the-ground investigators and technical experts. Given the past record; given the fact that the present structure is already designed to meet the Agency's goals; and given the adverse impact on an already well operating component of the program; why would the Agency want to consider such an apparently unnecessary and probable distruptive action?

Having said all this, the largest issue reflecting EPA's commitment to criminal enforcement over the past six years is the demonstrated imbalance between supply and demand. The program is woefully under-funded and under-manned, even by EPA's own assessment, which I believe was grossly under-estimated. There is at present approximately one criminal investigator per state. Through fiscal year 1989, there were no workyears specifically assigned for the technical and scientific personnel who are necessary to virtually every successful criminal case preparation. During my tenure as Director of NEIC it was always necessary to transfer substantial amounts of technical expert workyears from civil enforcement activities to assure a viable and productive criminal investigation capability.

Consequently, I can endorse wholeheartedly the concepts in a draft of a bill proposed by Senator Lieberman which I have been given the opportunity to review. Substantial increases in the number of criminal investigators as well as technical and scientific experts are necessary for the NEIC to meet its responsibilities in managing environmental criminal investigations. I am also pleased to note that the draft bill as well as the Deputy Administrator's statement address the need for a significant expansion of the training capabilities which have been so efficient in leveraging State and local activities in criminal enforcement.

B. Civil Enforcement

A few remarks regarding EPA's civil enforcement program are appropriate. There is a greater familiarity by the public and the regulated community with EPA's civil enforcement effort due to the high visibility accorded the program by most EPA Administrators and the Congress over a long period of time, as well as the substantial achievements which civil enforcement has accomplished, as noted by Mr. Habicht. Historically, issues addressed by civil enforcement have involved design and installation of treatment technology to achieve effluent and emission limitations as well as assignment of liability for environmental violations. NEIC has historically played a major role in providing technical and other investigative support to large-scale environmental civil case preparations where judicial precedents are at issue.

It is my belief, however, that the issues to be litigated through the civil enforcement program in the 1990's will differ substantially. It will involve the following characteristics:

A. Evidence of improper conduct will involve operation and maintenance practices as well as interpretation of ambiguous environmental regulations.

B. The patterns of conduct for potential violations will be technologically sophisticated and require the ability to analyze and evaluate complex paper trails.

C. 'These cases will take long periods of time to develop and will require relatively large teams of attorneys, technical personnel, document control specialists, and computer support.

D. More of these cases will involve the need for trained witnesses, litigation tested evidence-gathering procedures, and legal specialists who are trained in litigation.

In my opinion, EPA should prepare to meet these litigation challenges in civil enforcement in a proactive way through organization of compliance information across all major program areas to permit efficient targeting of probable violators. Targeted compliance inspections should emphasize the use of multimedia environmental auditing techniques to demonstrate continuing compliance or noncompliance with all applicable regulations by the source.

The capability to organize information for compliance inspection targeting and to conduct cross program inspections using environmental auditing presently exists within the Agency at the NEIC and a few Regional Offices. These procedures have been successfully applied in assessing compliance by Federal facilities. It is feasible and timely to apply these procedures to the entire civil enforcement program across all program areas.

However, as is the case in the criminal investigation program, to do this requires organizationally dedicated groups of trained specialists with diverse technical, scientific and investigative backgrounds who must work in a coordinated and cooperative team approach. A major training program in this regard is necessary for Agency and State compliance inspection personnel.

At the present time, the Agency, through its Regional Environmental Services Divisions, has a cadre of several hundred field and laboratory personnel who could be trained in compliance inspections and evidence auditing techniques across all program areas to provide support for civil enforcement case preparations. If this could be accomplished, it would not disrupt the existing technical capabilities in the Agency's Program Offices. It would have the added benefit of freeing additional technical, scientific experts at the NEIC to concentrate on criminal investigations. NEIC could also serve as a focus for computerized compliance information management and dissemination for targeting and intelligence purposes, as well as a training center for EPA's civil inspectors in environmental auditing and case preparation litigation support procedures.

I hope that the observations and suggestions offered in this statement will be considered by the Agency and the Subcommittee in meeting their common goals for a firm, fair and responsive environmental enforcement program.

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REMARKS OF DONALD E. MIELKE
TO THE SUBCOMMITTEE ON TOXIC SUBSTANCES,
ENVIRONMENTAL OVERSIGHT, RESEARCH & DEVELOPMENT
OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
OF THE UNITED STATES SENATE
NOVEMBER 15, 1989

Mr. Chairman and distinguished members of the Subcommittee:

The Subcommittee's gracious invitation to a local prosecutor to provide testimony today is significant because it serves as recognition that local law enforcement must have a key role in the future of our nation's environmental protection. As the elected District Attorney in a community of 500,000 persons in the metropolitan Denver area, I have become increasingly aware that local officials are often the first to learn of criminal violations of state and federal environmental laws. In my role as a member of the Board of Directors of the National District Attorneys Association, and as the Chairman of the Environmental Protection Committee of that organization, I have also learned that our citizens have increasingly come to expect local officials to deal with hazardous materials violations and other crimes which relate to the environment as a victim.

As the Subcommittee may know, the criminal prosecution of hazardous materials statutes is undergoing rapid growth and change. Only a few years ago, the prosecution of hazardous waste "dumpers" was virtually unknown. It was not until the public learned of the events at Love Canal and Times Beach that citizens began to demand greater accountability in the detection and prosecution of environmental crimes.

Today, there is a growing public sentiment that persons and corporations who criminally dispose of hazardous materials are as dangerous to society as the "traditional criminals" responsible for street crime. Indeed, an environmental criminal could become the next "mass murderer", even though the cancers, birth defects and other problems he causes may take years to appear.

Until a few years ago, it was generally thought that the enforcement of environmental protection laws was largely the province of the federal government through the Environmental Protection Agency. The last few years have taught us that the resources of the EPA have been stretched beyond the breaking point in criminal investigations. With only forty-eight special agents nationwide, the EPA cannot handle more than a fraction of the serious complaints which it receives. Its ability to help state and local law enforcement efforts has therefore been limited.

It was also thought some years ago that the best approach to pollution law enforcement was to permit state attorneys general to use their civil powers to obtain injunctions and civil fines against polluters. While such civil actions may have their place, experience has taught us that true polluters view such governmental lawsuits as a part of the cost of doing business. Until a potential for criminal prosecution is added to the equation, many of these environmental criminals will continue to illegally store, transport and dump hazardous wastes in blatant violation of the law.

Our current criminal enforcement of the environmental statutes at the local level is hampered by three significant problems. First, only a relatively small number of investigators and attorneys have been trained in these special techniques and procedures required for the successful prosecution of environmental crime. Our biggest federal ally in this effort has been the EPA's Hazardous Materials Investigation Training Program at the Federal Law Enforcement Training Center in Glynco, Georgia. Unfortunately, the excellent curriculum offered at Glynco has only been available to a total of 268 students since its inception in 1986. Of these trainees, only thirty-five participants have been local law enforcement investigators.

There are other training systems in place, some of which are funded by the EPA's National Enforcement Investigation Center in Lakewood, Colorado. However, some of the organizations which sponsor this training have a decidedly civil bias, in part because they are controlled by state attorneys general who often have no criminal law enforcement authority. Therefore, meaningful training in the criminal investigation of pollution-related offenses has often been difficult to find.

Our second major stumbling block to effective local criminal prosecution has been the frequent unavailability of adequate laboratory and technical resources. As the Subcommittee knows, the investigation of hazardous materials crimes requires a high degree of scientific sophistication which is not generally available in state and local laboratories. Sample collection procedures and testing techniques are constantly changing, and require state-of-the-art equipment and technical training to be accepted in court. Of course, even the best testing procedures must be supported by readily available expert witnesses who can testify that the results have scientific validity beyond a reasonable doubt.

Once again, the greatest friend of local law enforcement has been the EPA's laboratory at the NEIC offices in Colorado. With only forty scientists and thirty field engineers, this lab is responsible for the analysis of samples in criminal cases from across the entire United States. Even the laboratory of the Federal Bureau of Investigation lacks the resources of the NEIC laboratory, and all FBI pollution case samples are sent to Lakewood for testing.

Regrettably, the relatively small size of this national laboratory puts a great strain on the availability of its equipment and its personnel. In a case in my jurisdiction, my deputy prosecutor was forced to send a toxic sample to a private laboratory because the backlog at the EPA laboratory would not permit the sample to be tested within the time required to ensure a scientifically reliable result. The cost of the use of private laboratories is substantial, and could in itself deter some prosecutors from undertaking a pollution case which might require a variety of scientific analyses.

Even if the EPA laboratory could process every local sample in timely fashion, expert testimony is still required during preliminary proceedings and trial to validate the test results. At its present level of staffing, it is difficult to expect that EPA scientists will be available to testify in court cases brought by local prosecutors across the entire country.

As the need for scientific support of locally-brought cases became more obvious, some state laboratories have been created to analyze hazardous materials samples. Typically, that function has been assigned to state health departments, in part because they have seemingly similar regulatory responsibilities.

Unfortunately, health department personnel are rarely trained in the forensic procedures necessary to properly test and preserve evidence and maintain the chains of custody necessary to make that evidence admissible at trial. In my own jurisdiction, a case ended abruptly when one of the state laboratories tested the sample and promptly discarded it. Unless such state laboratories have much greater training and much more frequent responsibilities in the forensic arena, it is likely that such errors will continue to plague the effective prosecution of environmental crimes at the local level.

The third major problem which frustrates local law enforcement is the general lack of shared information about what is happening in pollution prosecutions elsewhere. Those prosecutors who rarely have occasion to do an environmental law case are often forced to "reinvent the wheel" with respect to pleadings and approaches to case preparation. Although there is federal support for the national dissemination of information about child abuse and drug-related prosecutions, there is no corresponding entity to provide assistance in the prosecution of environmental crimes. It is easy to see why some prosecutors might view the lack of readily available support as sufficient reason to avoid environmental prosecutions altogether.

While great strides have been made in the investigation and prosecution of environmental crimes, it is now time for a quantum leap forward. The Subcommittee and the Congress as a whole are uniquely suited to address this problem as the expansion and reorganization of the Environmental Protection Agency are considered.

There is little doubt that the EPA will continue to be the principal repository of scientific and investigative expertise for the management for pollution cases. Senator Lieberman has considered the introduction of legislation which would dramatically increase the number of special agents and civil enforcement personnel within the EPA. I strongly urge the Subcommittee to view any such legislation with great favor, particularly as it may enhance the ability of the NEIC to form local or regional "task force" arrangements to facilitate the investigation of environmental crimes.

As the Subcommittee may know, the United States Drug Enforcement Administration has for many years used local task forces comprised of DEA special agents and local law enforcement officers loaned to the DEA by their respective police agencies. Acting under the direction of DEA special agents, the local law enforcement officers participate in joint federal-local investigations of drug trafficking. The result is that far more drug pushers are caught by the combined effort that could ever be snared by federal agents alone. In return for their assistance, the local detectives receive invaluable training which they take back to their own agencies after their tour of duty with the task force has ended.

A similar program in which the EPA has joined forces with local law enforcement officers is currently in place in Seattle. Under the direction of EPA special agents, this task force investigates significant regional pollution crimes with an effectiveness which exceeds what local officials or the EPA could accomplish acting alone. A significant increase in the number of EPA special agents could facilitate the spread of the task force idea to a number of other cities across the country.

Where there is no EPA-local task force, it is necessary to have additional special agents and support personnel to provide consultation and advice to local law enforcement officials who contemplate the preparation of a pollution case. In my own jurisdiction, the collaboration between the NEIC and my deputy district attorneys led to the first successful felony criminal prosecution of any pollution case in Colorado.

Certain of Senator Lieberman's other proposals may do much to address the need for greater federal participation in the training of pollution case investigators. I strongly urge you to favorably consider any legislation which would greatly increase the availability of the Hazardous Materials Investigation Training Program which is currently offered at Glynco, Georgia. Instead of training thirty-five local criminal investigators in about 3 years, perhaps as many as 500 investigators should be trained annually. If this number is too large to be managed at Glynco, there are other federal training sites which could offer the same curriculum.

As the policy considerations for such training are developed, I urge you to remember that the preparation of state and local officials to handle environmental crimes has not been completely successful. In my view, it has been a mistake to emphasiz the training of health department personnel and other regulators in the investigation of these cases. Instead, I believe experience has taught us that trained police detectives are far better suited to the investigation of environmental law violations because they are experienced in interviewing, evidence collection, warrant execution and the other aspects of case preparation which are often wholly unfamiliar to a regulatory official. It is simply easier and more efficient to train a police detective in the scientific and technical nuances of pollution-related investigations that it is to train a regulator to do criminal investigations.

The Environmental Protection Agency is also the cornerstone to the solution of the environmental laboratory problem. In some respects, the relationship between the EPA labs and local law enforcement agencies is similar to the relationship between the police and the Federal Bureau of Investigation laboratories in the 1960s. During that era, the FBI clearly maintained the finest forensic laboratory in the world. Although some state and local facilities could perform routine tests, the personnel and scientific techniques at the FBI laboratory were far more sophisticated than anything local government could offer.

The nation needs the EPA laboratories to provide the same leadership and technical assistance in the criminal investigation of pollution matters. In my view, there are two alternative means to accomplish this goal. First, it may be possible to transfer much of the civil investigation workload from the laboratory at the NEIC to the various regional EPA laboratories across the country. Once free of its civil case analyses, the NEIC laboratory could devote itself to criminal matters in the same fashion as the laboratory of the FBI.

In the alternative, it may be appropriate to expand and enhance the abilities of the regional laboratories of the Agency. If technical assistance were available at the regional level, law enforcement officers and their toxic materials samples would have less far to travel to reach the destination lab. The Agency's scientists and engineers would also have less far to travel in order to provide expert testimony in court. Certainly, the use of regional laboratories could help to enhance the communication between the EPA's scientific personnel and local law enforcement officers in the field.

Whatever approach the Congress determines best for the EPA laboratories, I strongly urge the expansion of training opportunities for state and local scientists at the EPA. While I do not anticipate that state and local laboratories will ever supplant the work of the EPA, some more routine analyses may become possible as state and local sophistication increases. The Environmental Protection Agency is clearly the most logical and best prepared entity to provide scientific training to state and local officials.

In order to bridge the communication gap which exists in the criminal law enforcement of environmental crimes, it is necessary to create a partnership between the Environmental Protection Agency, the Department of Justice, and such organizations as the National District Attorneys Association, the National Sheriffs Association and the International Association of Chiefs of Police. By joining these representative organizations together with the appropriate parts of the federal government, state and local prosecutors and police officials can share vital intelligence information, report successful and unsuccessful investigative operations and save significant amounts of time in criminal case preparation.

There is substantial precedent for the creation of such a joint effort. Just as the American Prosecutors Research Institute now has the National Center for the Prosecution of Child Abuse and the Center for Local Prosecution of Drug Offenses, so must there be a National Center for the Prosecution of Environmental Crime. Funded by a grant from the Department of Justice or the Environmental Protection Agency, this entity would be staffed by a small group of attorneys and support personnel. Using personal computers to access centralized data, the Center could even provide a readily available "brief bank", sample affidavits for search and arrest warrants, sample pleadings, and an electronic information exchange network.

The Center could also coordinate and help to standardize the training of police officers, prosecutors and scientific support personnel at the state and local level. As the Subcommittee knows, there are presently four regional environmental associations which operate under the general umbrella of the EPA. Much of the past work of these regional entities has focused on the civil approach to environmental law enforcement. Recently, under the leadership of the NEIC, criminal prosecution has become more of a priority. However, a balance between criminal and civil pollution enforcement cannot be expected until the new National Center for the Prosecution of Environmental Crime is created.

Because the EPA is so central to the success or failure of local environmental law enforcement, it is appropriate to comment on certain aspects of the proposed reorganization the enforcement arm of the Agency. While the proposed restructuring plan was not available at the time these remarks were prepared, there has been some discussion that the criminal investigators of the NEIC should be relocated to Washington in a centralized office.

I strongly urge the Congress and the leadership of the Environmental Protection Agency to reconsider any such plan. In all my exposure to various federal programs, I have never been aware of a more effective unit than the 1-2 punch of the NEIC special agents and their scientific and technical support from the laboratories in the same building. The criminal investigators and the scientists are in close communication, and we have seen examples of how this working relationship has improved the achievement of the Agency's goals. To reabsorb the criminal investigators within the federal bureaucracy in Washington would almost certainly decrease their overall effectiveness and their accessibility to local and state law enforcement agents. The NEIC is effective and responsive within the limits of its current resources, and it should not be dismantled.

Of course, other federal policies and programs have great impact upon the criminal prosecution of environmental crimes. For example, as Chairman of the NDAA Environmental Protection Committee, I have learned that the Department of Justice has a small but effective cadre of attorneys in the Enviromental Crimes Section of the Land and Natural Resources Division.

These attorneys are expected to provide much of the technical expertise in the preparation and prosecution of federal pollution crimes. Unfortunately, there are only twenty-four lawyers in this section, compared to more than 200 attorneys assigned to civil enforcement tasks at the EPA. I urge the Congress to consider a dramatic expansion of the Environmental Crimes Section in preparation for what I expect to be a great increase in the federal prosecution of pollution offenses.

As the Subcommittee may know, it is regrettably true that the federal government itself is a major polluter. The Rocky Flats Nuclear Weapons Facility is located in my jurisdicition, where a major criminal investigation has been under way for several months. All of us have seen national news reports which allege that the Department of Defense has been requiring the purchase of hazardous wastes at auction as a part of a package of desirable surplus items. Obviously, hazardous wastes should not be transfered to unqualified persons in this fashion.

It is therefore time for the federal government to consider a waiver of sovereign immunity as it pertains to environmental crimes at federal facilities and within federal enclaves. Federal contractors and others who have concealed themselves behind the cloak of such immunity must become fully accountable to state and local officials, even to the extent that they become subject to criminal sanctions under existing pollution laws.

As the Congress considers environmental enforcement priorities, it may be useful to consider models which have worked well in other aspects of criminal justice. I offer three of these for the Subcommittee's consideration.

As you know, state and federal prosecutors have made increasing use of forfeiture statutes and public nuisance laws to attack a variety of criminal problems. The drug model is well known: personal property or real estate which is used in furtherance of the possession or trafficking of illegal substances is subject to forfeiture. Federal, state and local authorities have seized everything from planes and motor vehicles to houses and businesses.

In Colorado, we even have the authority to seize the automobiles of persons who are Habitual Traffic Offenders. The judicious use of this power has helped to make significant cuts in drunk driving and other serious traffic crimes.

In the criminal enforcement of the environmental statutes, forfeiture actions can be used to raise the stakes for criminal polluters. For example, the trucks used in the illegal transportation of hazardous substances can be seized. These forfeitures are most effective when they are performed in addition to whatever criminal sanctions are available. We have often found that the economic loss to criminals which results from a forfeiture is greater than the total amount of fines which are imposed against them. I therefore encourage the Congress to consider broadening the forfeiture power of the federal government in the environmental area.

A second successful approach to criminal justice has been the creation of model statutes which are made available for uniform adoption by the states. With all the attention that has been given to major environmental crimes in the recent past, it is disturbing to remember that some states still are without strong and appropriate prohibitions against criminal pollution of the environment. A few states even lack felony criminal sanctions.

When I was a state legislator, I was concerned that the forced imposition of uniform laws was a violation of a state's right of self-determination. However, when the impact of criminal conduct readily reaches across state lines, as it does with the unlawful transportation and disposal of hazardous materials, the states should be strongly encouraged by federal law and policy to adopt appropriately drafted model legislation to combat the problem.

I urge the Congress to consider legislation which provides incentives to states which adopt model statutes providing criminal penalties for the pollution of the environment. I strongly believe that the imposition of uniform sanctions across the country can do much to prevent the movement of potential polluters across state lines in an effort to escape effective prosecution.

A third approach to more effective environmental crime enforcement is known in some quarters as "fine-sharing". When the criminal investigation of major pollution incidents results in the collection of huge fines from the defendant corporation, it is appropriate to share those fines among the local, state and federal entities which participated in the investigation. For example, when Shell Oil received a multi-million dollar fine as the result of a case brought by the District Attorney of Solano County, California, the money derived from that penalty was shared with various governmental entities.

It is obvious that, when such monies are available, local and state officials are far more inclined to devote resources to complex investigations. It is appropriate for the Congress and the administration of the Environmental Protection Agency to develop ways in which local jurisdictions that assist the federal government in major pollution investigations may share in the revenues which are derived from fines in cases brought to a successful conclusion. The availability of "fine-sharing" should become a matter of public knowledge to encourage polluters to think twice about what resources may be devoted to a criminal investigation of their activities.

Eventually, I expect that the investigation of environmental crimes by local officials will become commonplace and that environmental offenses will become prosecutorial priorities. We have seen the impact of the public's growing awareness of such criminal problems as child abuse, drunk driving and domestic violence. As our constituents at every level become increasingly aware of the immediate and long-term hazards posed by criminal polluters, you and I will be expected to develop creative and effective ways to approach the problem. I sincerely hope that ours will be the generation of public officials which is remembered as the first to fully act upon the realization that the environment itself can be a crime victim.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Summer Meeting
July 16, 1989
Portland, Maine

RESOLUTION

URGING THE CONGRESS OF THE UNITED STATES TO ADOPT LEGISLATION CLARIFYING THE WAIVER OF FEDERAL SOVEREIGN IMMUNITY TO SUBJECT FEDERAL FACILITIES AND AGENTS, EMPLOYEES OR OFFICERS OF THE UNITED STATES TO THE SAME ACCOUNTABILITY THAT APPLIES TO STATES, LOCAL GOVERNMENTS AND PRIVATE INDUSTRY, ESPECIALLY CRIMINAL SANCTIONS, INCLUDING FINE OR IMPRISONMENT.

WHEREAS, a significant number of the most dangerous hazardous waste disposal sites in the United States that pose a significant threat to public health and the environment are located at federal facilities; and

WHEREAS, federal facilities are among the worst violators of federal and state solid and hazardous waste laws; and

WHEREAS, Executive Order 12088 requires all federal agencies to comply with all applicable pollution control standards; and

WHEREAS, the states have experienced significant problems in bringing federal facilities into compliance with federal and state solid and hazardous waste laws because the federal facilities refuse to acknowledge state regulatory authority over their facilities; and

WHEREAS, disputes over state enforcement authority at federal facilities has caused costly, time-consuming and acrimonious litigation between the states and the federal agencies; and

WHEREAS, the U.S. Environmental Protection Agency's and the states' lack of clear enforcement authority has eroded the public confidence in the federal government's willingness and ability to address the serious solid and hazardous waste management problems at federal facilities; and

WHEREAS, federal agencies must be subject to the same sanctions as private industry, states , and local governments for violations of federal and state solid and hazardous waste laws to deter violations of and ensure compliance with these laws; and

WHEREAS, the Congress is considering HR 1058 and S 1140, which would clarify the federal sovereign immunity waiver under the Resource Conservation and Recovery Act.

NOW, THEREFORE, BE IT RESOLVED THAT
THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION:

1) supports HR 1056 and S1140, legislation which would a) provide states with comprehensive enforcement authority for hazardous waste programs; b) subject federal facilities to the same accountability, procedural, and substantive enforcement provisions that apply to state and local governments and private industry; c) enhance proper waste management practices at federal facilities in the future by ensuring that federal agencies comply with federal and state solid and hazardous was laws; and d) most importantly, subject any agent, employee, or officer of the United States to any criminal sanction (including, but not limited to, fine or imprisonment) under any state solid or hazardous waste law; and

2) authorizes the Executive Director and General Counsel to transmit this resolution to the President of the United State and to the Environmental Protection Agency Administrator, William Reilly, and to the appropriate members of his staff; to Secretary Cheney of the Department of Defense; to Admiral Watkins of the Department of Energy; to the members of Congress; and to other interested associations.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Fall Board Meeting
November 9-12, 1989
New Orleans, Louisiana

RESOLUTION

URGING THE CONGRESS OF THE UNITED STATES TO ADOPT LEGISLATION TO INCREASE THE NUMBER OF CRIMINAL INVESTIGATORS IN THE EPA AND TO ESTABLISH A NATIONAL ENFORCEMENT TRAINING INSTITUTE TO TRAIN FEDERAL, STATE, AND LOCAL LAWYERS, INSPECTORS, INVESTIGATORS AND TECHNICAL EXPERTS IN THE ENFORCEMENT OF OUR NATION'S ENVIRONMENTAL LAWS.

WHEREAS, the Congress is considering legislation to provide better enforcement of the environmental laws; and

WHEREAS, the National District Attorneys Association strongly endorses all efforts that will enforce our nation's environmental criminal laws; and

WHEREAS, legislation has been proposed that will (1) more than triple the number of criminal investigators in EPA, from 48 to 175; and (2) establish a National Enforcement Training Institute to train federal, state and local lawyers, inspectors, investigators and technical experts in the enforcement of our nation's environmental laws; and

WHEREAS, local prosecutors have used the resources of the National Environmental Investigator Center (NEIC), both criminal investigators and lab support; and

WHEREAS, the present federal case load at the NEIC takes all the the resources available, and there is a tremendous need for support of state and local investigations; and

WHEREAS, there have only been a relatively small number of local criminal investigators that have been trained at the EPA's Hazardous Materials Investigation Training Program at the Federal Law Enforcement Training Center in Glynco, Georgia; and

WHEREAS, local law enforcement has been hampered by the lack of trained local investigators in the special techniques and procedures required for the successful prosecution of environmental crime.

NOW, THEREFORE, BE IT RESOLVED THAT
THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION:

1) supports federal legislation which a) increased the number of criminal investigators in the Environmental Protection Agency; and b) establishes a National Enforcement Training Institute to train federal, state and local lawyers, inspectors, investigators and technical experts in the enforcement of our Nation's environmental laws; and

2) authorizes the Executive Director to transmit this resolution to the President of the United States, to the Environmental Protection Agency Administrator, William Reilly, and to the appropriate members of his staff, to the members of Congress, and to other interested associations.